TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

[redacted]1922

OCTOBER TERM, 1921.

No. [redacted]257

THE PRICE FIRE & WATER PROOFING COMPANY,
APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED JANUARY 23, 1922.

(28,667)

(28,667)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 712.

THE PRICE FIRE & WATER PROOFING COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

	Original.	Print.
Petition	1	1
Exhibit No. 2—Letters and Order No. 282-N from Quartermaster Corps U. S. Army	33	20
Exhibit No. 10—Letters and contract No. 920-N from Quartermaster Corps U. S. Army	36	23
General traverse	47	31
Argument and submission of case	47	32
Findings of fact	48	32
Conclusions of law	54	38
Judgment	55	38
Motion for new trial and order overruling motion	55	38
Application for appeal and order allowing appeal	55	39
Clerk's certificate	56	39

Judd & Detweiler (Inc.), Printers, Washington, D. C., February 6, 1923.

1 I. *Petition and Exhibits.*

Filed September 29, 1920, Together with Corrections to Petition Allowed to be Made by the Court October 12, 1921.

Court of Claims.

No. 34707.

THE PRICE FIRE & WATER PROOFING COMPANY, Plaintiff,

vs.

THE UNITED STATES, Defendants.

Petition.

To the Honorable the Chief Justice and Judges of the Court of Claims:

Comes now the plaintiff, above named, and for its several causes of action alleges:

Purchase Orders, Memorandums and Demands.

The plaintiff is a Corporation duly organized, existing and doing business and by virtue of the laws of the State of New York, and its place of business has been for many years and now is in the city of Poughkeepsie, in said State. That its business is the treatment of cloth by dyeing, water-proofing and fireproofing, preparing and rendering such cloth suitable and in proper condition to be used for curtains in theaters and other similar places, for tents, wagon covers, tarpaulins, gas mask covers during the time of war, and other similar purposes, using therein and therefor the different grades of duck or canvas furnished for said treatment, and using therefor various original chemical processes, treating the same specially in three different processes called Emla A, Repelite and Paraffin, each process being well known in this business and well known to the trade so established by the plaintiff for the purposes above set out, all of which was well known to the defendants.

2

Plaintiff further alleges that this Corporation had been in existence for many years prior to 1917, and had by skill and energy and wide acquaintance built up a large, extensive and profitable business in the dyeing, waterproofing and fireproofing of cloth, as above described, which business prior to said year 1917 had become permanent and regular with such customers and with such trade as were using the particular cloths so treated by the processes created, developed and established in the business above described. The business thus built up was not of a general nature, but was peculiar in that the trade demanding such services was extremely limited, but within such limits

the business was regular, constant and very profitable to this plaintiff. The plaintiff gave its entire time and attention to the business, as above described, and was, during a number of years prior to 1917, and is now dependent entirely upon the business thus established for its occupation, and the employment of its capital and facilities.

That when war was declared by the United States against Germany in the Spring of 1917, and by reason thereof and the conditions following thereon, the defendants found that they needed the treatment of cloth, as above described, for the uses of the War Department in the prosecution of the war, and also found that there was but small chance and opportunity for supplying such demands outside of and beyond the plant facilities of this plaintiff, as above located and described. That because of these conditions, the great demands of the defendants and the limited supply of cloth treated by the
3 processes originated and used by the plaintiff, as above described, said defendants needed and demanded of the plaintiff that it use and supply its entire capital and plant facilities, means, force, business arrangements and abilities of every kind and nature for the purpose of treating, by their dyeing and waterproofing processes, such materials known as duck as should be furnished by the defendants, so that the same could be used by the War Department of the defendants in the prosecution of the war so declared. That the plaintiff was told and given to understand by repeated assertions of the officers and agents of the defendants that any refusal to furnish the assistance and perform the service required would be considered an act unfriendly to the prosecution of the war, which would result in actually commandeering the plant and its facilities, and would subject the officers of the company to criminal prosecution. That by reason thereof, the plaintiff performed said services as demanded, and from time to time acknowledged the receipt of said demands. That the defendants proposed to furnish cloth and materials in such quantities, at such times and under such conditions, as were needed by the War Department, and demanded of the plaintiff that it treat said cloth and materials by its chemical and other processes in such quantities, at such times and under such conditions, as they should specify, and as would meet the varying demands of the defendants from time to time in the prosecution of the war.

That these demands so made upon the plaintiff by the officers and agents of the defendants were both written and oral; the written demands being evidenced by a series of unsolicited and imposed purchase orders and memorandums made at various times and in various forms by the officers and agents of the defendants, and a series of oral demands, also made by said officers and agents upon the plaintiff by word of mouth and by telephone connections at various
4 times, but the purchase orders and memorandums were not executed in the manner prescribed by law, and were in an irregular and unauthorized form, but which were all made valid, legal and binding, the same as though they had all been executed in writing and under due form of law, by the act of Congress, approved March 2nd, 1919, known as the Dent Law, 40 Stat., 1272.

That said purchase orders and memorandums were changed and

modified from time to time by supplements, correction and modification orders in writing, and also by oral instructions and orders given by the defendants to the plaintiff, all of which subsequent orders were accepted and acknowledged by the plaintiff, and became from time to time a part of the purchase orders, memorandum and oral demands, in accordance with the various and continuing needs and requirements of the defendants in the prosecution of the war, which, as then understood by the parties hereto, was expected to last not less than three years and possibly for a longer period, and all said orders and demands were made in view of such prospective continuance of the war.

That there were in all twenty of said written purchase orders and memorandums consisting of fifty-four separate and distinct items, so made by and between the defendants and the plaintiff, nineteen of which were made and executed by the officers of the Quartermaster Corps, United States Army, and one by the officers and agents of the Medical Department, Sanitary Corps of the United States Army, but all were executed in the manner above described and were validated by the law above referred to.

That in connection with and in addition to the said twenty purchase orders and memorandums, there were twenty-eight supplements, correction and modification orders issued in writing, all of which changed and modified the orders to which they were applicable in certain respects. That the said twenty orders in their original form provided for the treatment of 6,254,714 linear yards of material to be supplied by defendants, but that by the provisions of the said supplements, correction and modification orders subsequently issued 2,960,199 yards were cancelled, thereby reducing the total linear yardage to 3,294,515 yards or 52 per cent of the original total. That the prices per yard provided for in said orders ranged from .07c. to .226c., according to the width and weight of the cloth and the process to be used, and that the total designated price based upon the original yardage and the original prices per yard amounted to $777,916.54, but that because of the yardage so cancelled, and the changes in the prices per yard so made by said supplements, correction and modification orders, the total price was thereby reduced to $377,654.85 or about 49 per cent of the total original price. That the changes and modifications in the yardage and prices resulting from the said supplements, correction and modification orders, materially changed the conditions, rights, expenditures and profits of the plaintiff, which had been provided for in the original purchase orders and memorandums.

That said twenty written purchase orders and memorandums, together with the twenty-eight supplements, correction and modification orders, are filed herewith and made part hereof, and marked Exhibits 1 to 20, respectively, to which special reference is had and are each and all made a part of each cause of action, subsequently set out herein, so far as the same may be applicable, and for convenience and the saving of unnecessary printing, Exhibits Nos. 2 and 10 are printed in full as and being fair and complete samples of the

other purchase orders and memorandums filed herewith, and made a part hereof.

That the said twenty written purchase orders and memoran-
6 dums, as herein set out, were executed and entered into by said parties on various dates, beginning on November 14, 1917, and all prior to November 12, 1918. That during the period from November 14, 1917, to November 19, 1918, the plaintiff, in order to comply with the provisions of said orders and the oral demands of the defendants, in connection therewith, made the necessary preparations and extensions, and purchased the necessary materials so as to perform and fulfill said orders and demands from time to time made, executed and demanded of the plaintiff by the defendants, and in order fully to comply with the provisions of said orders and demands, the plaintiff purchased and secured such materials and supplies, and made such alterations and additions to its plant and facilities, re-organized its working force and adjusted and cancelled its former contracts and outstanding obligations with its customers in its former commercial business, so as completely to comply with the demands and requirements made in said purchase orders and memorandums and special demands, and in every way made full and ample preparations to comply with the demands of the defendants, both written and verbal, so made from time to time, and by so doing completely cancelled and lost its prior business and profits, and at the demands and solicitations of the defendants in effect turned its plant, facilities, capital, forces, skill, energy and full business capacities over to and for the benefit of the defendants, in compliance with the demands so made upon it.

That of these twenty purchase orders and memorandums, some were completely performed in accordance with the provisions therein made. That others were only partially performed because of the subsequent demands and orders, both in writing and verbal, by the defendants, although the plaintiff was ready, willing and fully prepared to perform each and every one of said orders, as originally made and entered into, and that some of the orders were from
7 time to time withdrawn and cancelled by the defendants, and no goods whatever were treated thereunder. That the treatment of the goods under the purchase orders and memorandums so far as the same were allowed to be completed, either in whole or in part by the defendants, was so completed by the plaintiff in accordance with the conditions prescribed and the goods duly inspected by the officers and agents of the defendants, and were at all times found to be satisfactory, and such parts as were so allowed to be completed were paid for, for the purposes above described, and the goods used or accepted for use in the prosecution of the war, as provided in said orders.

That in the performance of said purchase orders and memorandums, so far as the same were allowed to be completed, as above described, plaintiff was compelled to cancel and relinquish its established and future commercial business, and did so cancel and relinquish the same, at the earnest and insistent requests and demands of the defendants, and was compelled to and did devote its entire

plant, facilities and organization to the services of the defendants, as directed by them, in carrying out said orders to the exclusion of all other business, whether then in actual existance or in contemplation, so as to comply with the needs and demands of the defendants in the prosecution of the war. That as a result of these extraordinary and wartime requirements and demands of the defendants, the entire plant and facilities were in effect not only taken over by the defendants and surrendered by the plaintiff thereto, but were so operated during the whole continuance of said orders. That the entire plant, facilities and organization of the plant were so turned over and devoted to the uses of the defendants, and its former business cancelled and commercial relations discontinued because of the demands and needs of the defendants, as represented by its officers and
8 agents, and for no other reason, and the orders merely specified the demands of the defendants, and the acknowledgment of the obligations therein on the part of the plaintiff.

That the said purchase orders, memorandums and supplementary demands as made from time to time provided that the defendants should furnish and ship to the plaintiff at its plant during the specifide periods, the cloth to be so treated, herein called gray goods. That said gray goods were supplied by defendants in an exceedingly irregular manner, rendering it difficult and many times impossible for the plaintiff to treat the goods within the periods specified in said orders. That as the treatment of said goods was completed, the plaintiff and the inspectors of the defendants located at the plant promptly notified the officers and agents of the defendants at their general offices of such completion, and that the finished goods were ready for shipment, and thereupon awaited shipping instructions to be furnished by the defendants. That the shipments of gray goods and the issuance of instructions for the shipment of goods after the same had been treated were so irregular and subject to various delays that the plaintiff was compelled at many and various times to hold and store large quantities of goods before treatment, and also of treated goods before shipment, and that such periods of delay caused great and serious congestion at the plant when untreated goods were held in enormous quantities, subject to orders from the defendants, and when treated goods were held for instructions as to shipment, thus resulting in decreased efficiency and great additional cost in operation of the plant and facilities, so prepared to comply with said orders executed in their regular order, and especially created large costs in labor, storage and insurance to the financial detriment of the plaintiff. That such irregular supply of gray goods and delayed instructions by the defendants as to the shipments of treated goods, and the delays consequent thereon, often caused not only a great
9 congestion in the operation of the plant, but especially at various times the failure of the defendants to supply a sufficient quantity of gray goods often caused partial and sometimes complete cessation of work resulting in further increased expense to the plaintiff.

Plaintiff further alleges that said twenty purchase orders and memorandums contained no provision for any changes therein, or

for their cancellation by the defendants prior to the full completion of each specific order, but that the defendants from time to time did change, annul, cancel and modify many of the outstanding orders in various stages of completion, and especially on or about the nineteenth day of November, 1918, without any prior notice or warning whatever to the plaintiff, ordered all the work suspended on said orders then existing, and in any stage of performance, and entirely cancelled the same because of the cessation of hostilities having been brought about by the Armistice of November 11, 1918, which suspension of work on all of said incompleted portions of said orders and the final cancellation and annulment of the same and the further acts of the defendants in connection therewith, resulted in a great loss to the plaintiff, not including in any cause of action hereinafter stated any loss of prospective or possible profits on any part of the incompleted orders so cancelled. That up to the suspension of work as ordered by defendants, plaintiff had completed the treatment of 2,866,622 yards, not including a certain yardage treated resulting from gray goods being shipped by the defendants in quantities in excess of those called for by certain orders. That the total amount so completed by plaintiff is only 46 per cent of the original amount arranged for in said twenty orders, the remaining 54 per cent of the original yardage having been cancelled by various supplements, correction or modification orders and the final order of suspension.

Plaintiff further alleges that the said several purchase orders, memorandums and verbal agreements were all of one general series of orders and demands made by the defendants upon the plaintiff for the treatment of the goods so furnished by them for the uses specified, and that said orders were not separate and distinct from each other in origin, development or completion, but that all were but a part of one indefinite series of orders, both written and verbal, unlimited as to number and as to time of performance, but all aggregated one indefinite and unlimited demand made by the defendants upon the plaintiff for treatment of specified goods for the uses and times mentioned above.

Plaintiff further alleges that under and by authority conferred by Section 1 of the Dent Law, above referred to, that plaintiff prepared and duly presented its claim for the losses incurred, to the Secretary of War through his duly appointed officers and agents, prior to June 30, 1919, and that said claim was so presented by the plaintiff in accordance with the provisions of said law and the rules and regulations established by the Secretary of War, and that after due conference and hearings between the plaintiff and the Secretary of War, through his duly authorized officers and agents, as aforesaid, while the Secretary of War offered to pay and adjust certain amounts and parts of said claim in whole or in part, yet the plaintiff was not willing to accept the adjustment, payment and compensation so offered therefor, and that the Secretary of War refused to make any adjustment or payment on any specific items in whole or in part, unless the plaintiff would cancel, withdraw and release all claims against the defendants arising under said purchase orders, memorandums and demands, all of which plaintiff was unwilling to do.

Plaintiff further alleges that because of the several acts and practices of the defendants, herein described, plaintiff was put to large expenditures and obligations and liabilities, which were necessarily incurred in performing or preparing to perform said purchase orders and memorandums, and that it was compelled to incur many extra and additional expenses, and to suffer severe losses in the performance of each part of said series of orders and demands, which said acts and practices of the defendants were not provided for in said orders and supplements, and which said acts and practices were not caused by any failure or inefficiency on the part of the plaintiff, but that said acts and practices of defendants grew out of the extraordinary conditions under which said defendants were vigorously engaged in the prosecution of the war, and which expenditures, obligations and liabilities so created by the defendants were included in the provisions of the law herein referred to, which might be settled and paid for either by the Secretary of War or adjudicated by this Court. That the specific expenditures, obligations and liabilities and resulting losses incurred by this plaintiff, and so created by these defendants, as herein alleged, are more particularly set out in the different causes of action following hereto, the foregoing allegations being made a part thereof, so far as the same may be applicable.

11

First Cause of Action.

Storage and Hauling Charges on Untreated Gray Goods.

Referring to the allegations hereinbefore made, and making the same a part of this cause of action, plaintiff further alleges that under the terms of the purchase orders, memorandums and demands made by the defendants upon the plaintiff, the defendants shipped to the plaintiff's plant from time to time large quantities of gray goods for the purpose of having them treated, as provided for in said orders. That plaintiff received said shipments of gray goods so shipped for the purpose of treatment and hauled them at its own expense from the cars or freight stations to its plant, and held the same there in storage awaiting further instructions from the defendants. That the defendants by supplementary orders, corrections and modifications cancelled large parts of the original orders for treatment of the goods so shipped after the plaintiff had so held them in storage for indefinite periods, and finally ordered the plaintiff to reship the goods to various places without treatment. That plaintiff held said gray goods so shipped for treatment, but retained without such treatment in storage for various lengths of time, and subsequently hauled them at its own expense from its plant to the cars or freight stations for shipment. That by reason thereof, said plaintiff was prevented from performing the services provided for in said orders and demands, and was compelled to incur and did incur the expenses of storage during the time the goods were so held by it, and of hauling the same both to and from the plaintiff's plant. That by verbal agreements entered into

12

between the officers and agents of the defendant and the plaintiff, the value of said storage was fixed at 10 cents per roll or bale for each month or a fraction thereof, during which the same was held in storage, and that the reasonable value and cost of the hauling was at the rate of 25 cents per roll or bale each way, both to and from the plaintiff's plant, as above described, and that it was agreed by the defendants that they would pay to the plaintiff the said costs and value of said services, as above described, which amounted to the sum of $2,147.05, no part of which has been paid. That the particular orders under which the said gray goods were shipped to and received by the plaintiff, the dates of receiving the same, the dates when the same were returned, the time held in storage, the number of rolls so included, the agreed price for storage and for hauling charges are herein set out, as shown in Exhibit No. 21, which is attached hereto and made a part hereof.

13

Second Cause of Action.

Storage Charges on Treated Goods After Notice or Completion.

For a second and further cause of action, the plaintiff alleges that under the provisions of the purchase orders, memorandums and demands, hereinbefore set out, the defendants shipped large amounts of gray goods to the plaintiff's plant for the purpose of treatment in accordance with the terms of said orders. That plaintiff received the same and treated them according to the requirements, specifications and demands of the defendants, and when said treatment was completed plaintiff and inspectors of the defendants located at the plant at once notified the agents of the defendants located in New York City, in writing, of such completion and requested of the defendants the necessary bills of lading and shipping instructions. That the defendants, however, neglected and delayed to forward within a reasonable time to the plaintiff such government bills of lading and shipping instructions, and by reason thereof the plaintiff was compelled to hold and did hold said treated goods in storage for various and unreasonable lengths of time. That by reason of said delay in so forwarding the bills of lading and shipping instructions, the plaintiff was compelled to incur the expenses of storage during said delayed periods and that by prices duly established by the officers and agents of the defendants, the value of said storage was at the rate of 10 cents per roll or bale for each month or a fraction thereof. That plaintiff in each case allowed the defendants a reasonable length of time after the date of notice of completion within which to forward to the plaintiff the government bills of lading and shipping instructions, as regularly requested by plaintiff, and in no case were said storage charges held by the plaintiff as a liability of the defendants until the expiration of at least eight days after the notice of such completion. That the storage of said treated goods beyond the reasonable limits for the receiving of bills of lading and shipping instructions was not within the requirements

14

and conditions of the purchase orders, memorandums and demands, but was entirely outside of the same and was not included in the services to be performed by the plaintiff at the prices agreed upon, but was entirely extra thereto. The storage of treated goods as herein alleged was caused through no fault or neglect of the plaintiff, but was due solely to the failures and delays on the part of the defendants. That the rate for said storage as established by defendants is fair and reasonable, and at said rate the value amounts to $544.60, all of which sum is now due and unpaid, as shown by Exhibit No. 22, which is attached hereto and made a part hereof.

Third Cause of Action.

Alterations and Additions to the Plant for Storage Purposes Including Restoration.

As a further and third cause of action, plaintiff alleges that each and all of said purchase orders, memorandums and demands provided for the shipment by the defendants of gray goods to the plaintiff's plant during certain specified periods of time for treatment, and that such shipments were to be so made by the defendants within such times and in accordance with the regular rules of business, as well understood between the plaintiff and the defendants, and with the full knowledge of the defendants as to the capacity and facilities of the plant of the plaintiff. In the shipments, however, so made by the defendants these conditions were not observed, and shipments of gray goods were made in such amounts and at such times that the capacity and facilities of the plaintiff's plant were overcrowded and congested, and the defendants acting under the stress of war demands, insisted and demanded that the plaintiff should increase the storage capacity of the plant to such an extent as to take care of these extra and irregular amounts so shipped over and above the capacity and facilities of the plaintiff's plant which were well known to the defendants. That in order to comply with the demands of the defendants so made for extra storage capacity, the plaintiff was required to build and construct and did build and construct an addition to the plant, known to the said parties as the building annex. That said building annex was built for the sole purpose of providing extra storage space for the defendants' goods so shipped, as above described, and could be used by the plaintiff for no other purpose whatsoever, and was not needed by the plaintiff prior to the orders and demands of the defendants. That said building annex so demanded by the defendants and constructed by the plaintiff has been of no use whatsoever to the plaintiff since the cancellation of the orders, and said building was not within the reasonable anticipation of either of the parties at the time said orders and demands were so made and given, and the cost of said annex was not within the estimate of costs when fixed and agreed to for the treatment of the goods by and between the parties. That the actual cost of the construction of said building

annex was the sum of $4,556.00, which was paid for by the plaintiff and since the cancellation of the orders, as above set out, has no value to the plaintiff, except the mere salvage value of the material of which the same was constructed, which salvage value amounts only to $350.00 and no more. That the total loss to the plaintiff because of the demands of the defendants and the construction of
16 said building by the plaintiff after deducting all credits due to the defendants because of such building and the salvage value, is the sum of $4,206.00, no part of which has been paid to the plaintiff by these defendants.

Plaintiff further alleges that because of the increased number of purchase orders and memorandums, and because of the additional demands constantly being made upon it by defendants for more and further storage room, the defendants demanded that the plaintiff should provide other and further storage room, and in compliance therewith the plaintiff was compelled to turn over and did convert to the use of the defendants for said storage an adjoining dwelling house then owned and rented out by the plaintiff, commonly known as the Wheeler house, which house was at the time yielding to the plaintiff a rental income of $47.00 per month. That said dwelling house at the time the same was demanded by the defendants was not in condition so that the same could be used for storage purposes, but in compliance with said demands the plaintiff was compelled to change and alter said house so that the same could be used for said purposes, and the cost of said changes and alterations so made was the sum of $884.16, which was paid by the plaintiff and was not included in any of the estimates of cost of treatment of goods by either *parties*. That upon the cancellation of said orders and the withdrawal of said business by the defendants from the plaintiff, said Wheeler house became and was of no value to the plaintiff in its condition at that time, and that the fair and reasonable expense of restoration to its former condition as a dwelling house is the sum of $4,667.00 and no less. That by reason of the demands of the defendants so made for the use of this dwelling house for storage purposes, the plaintiff lost the use and value of said house as a tenament from and after the first of March, 1918, and since that time has been able to derive no revenue therefrom whatsoever, and that the plaintiff has lost the sum of $884.16,
17 incurred by reason of said changes and alterations, the loss of $4,667.00, the reasonable expense of restoration, the loss of $752.00, the rental value thereof, while the salvage value is the sum of $200.00 and no more.

That by reason of the demands of the defendants and the compliance of the plaintiff in furnishing this extra storage in the new building and the dwelling house, aforesaid, plaintiff has sustained a total loss of $11,249.16 and no less, all of which remains due and unpaid.

Fourth Cause of Action.

Extra Protection Demanded by the Defendants.

That as a further and fourth cause of action, the plaintiff alleges that after the purchase orders and memorandums were cancelled on November 19, 1918, and the further demands for continued treatment of goods had ceased, and all work had been suspended by the order of the defendants, the plaintiff was compelled to hold in storage and did so hold in storage until June 16, 1919, a considerable amount of both treated and untreated goods, awaiting the orders of the defendants for shipment thereof. That such holding of these goods between said dates was not within any of the provisions of the orders, or within the prior demands of the defendants, but was a new and additional demand by the defendants requiring the plaintiff to employ extra watchmen to guard the plant so containing said goods between said dates, which watchmen were required to be on duty both day and night. That said plaintiff was required by the written and oral orders of the defendants to continue former watchmen who had been employed by the plaintiff to remain on duty after the cancellation of said orders and the suspension of all work thereon in order to protect the defendants' goods, then held in storage in said plant, as long as said goods were in the plain-
18 tiff's possession. That the wages so paid to said watchmen after their prior employment and during the period between November 19, 1918, and June 16, 1919, amounted to $581.35, as shown by Exhibit No. 23, which is attached hereto and made a part hereof, which expense was not anticipated by either *parties* in making and accepting the orders, above mentioned, and was not included in any part of the cost of performing the services therein required, but is an expense incurred by the direct orders of the defendants for an additional service after the order were cancelled, to be performed for the protection of the defendants' goods.

Plaintiff further alleges that in further protection to the goods of the defendants so held in storage, after the orders were cancelled, and to the plant of the plaintiff during the period of performance of the orders and demands, and to the goods so stored in said plant during the whole of said time, the defendants insisted and demanded of the plaintiff that as a war measure and to protect at all times from unusual and increasing dangers the plant and the goods of the defendants, so within the possession of the plaintiff, the plaintiff should construct a fence of extraordinary strength and heighth so as to enclose the entire property. That the plaintiff in compliance with these orders so made by the agents of the defendants then at the plant, did so construct said fence and enclosed the entire plant therein and thereby incurred an additional and a heavy expense, which was not within the contemplation of either of the parties at the time the orders and demands were made and accepted, but was deemed necessary by the defendants for its proper protection. That said fence was entirely unnecessary as a part of the facilities of the

plaintiff's plant under ordinary circumstances, and was useless to the plaintiff from and after the time that the orders were cancelled and the goods entirely removed therefrom, excepting as to
19 the value of the material and the incidental value thereof amounting to the sum of $250.00 and no more. That the cost of said fence amounted to $1,279.20, and that after allowing the defendants all due and reasonable credits for the salvage value of the materials and any and all incidental value which the plaintiff may have derived therefrom, the loss to the plaintiff is the sum of $1,029.20 and no less, which together with the wages of the watchmen in the sum of $581.35, as above alleged, amounts to $2,953.11, all of which is due and unpaid.

Fifth Cause of Action.

Wages Paid Unemployed Labor from December 29, 1917, to March 23, 1918.

As a further and fifth cause of action, plaintiff alleges that for some time prior to December 29, 1917, the agents of the defendants continuously urged and demanded that plaintiff increase the productive capacity of its plant by adding to its working force, facilities, equipment and organization, so as to operate for twenty-four hours each day in order that the defendants might increase the amount of material so treated by the plaintiff, day by day, and that the defendants promised and expected to furnish a sufficient amount of gray goods to be treated so as fully to employ an increased labor force to the extent above indicated. That in accordance with the demands of the defendants, the plaintiff did increase its organization and employed a number of skilled workmen sufficient to operate the plant twenty-four hours each day, and so retained said additional workmen from December 29, 1917, to March 23, 1918, in readiness so as to treat the full amount of gray goods expected to be delivered by the defendants, thus being prepared to
20 employ the increased capacity and facilities of the plant to the extent above set out.

The plaintiff further alleges that during the period from December 29, 1917, to March 23, 1918, the defendants failed to deliver a sufficient amount of gray goods under orders then in force, or under additional orders and demands, so as to supply and insure the operation of the plant for twenty-four hours each day, and that the plaintiff was required by the defendants under its continuous orders to retain the extra force employed in addition to its regular force, and to pay their wages at a greatly increased cost and expense to the plaintiff. That because of the failure of the defendants to deliver a sufficient amount of gray goods for such treatment, the plaintiff was unable to use the services of said extra workmen during the said period above described, and was thereby greatly delayed and hindered in the performance of said orders and demands, through no fault of its own. That plaintiff repeatedly notified agents of the defendants of the conditions then existing at the plant

and urged that an adequate amount of gray goods be regularly supplied so that the plaintiff might proceed with the performance of said orders and demands, in accordance with the increased requirements of the defendants, as above alleged. That the wages paid said extra workmen during the period from December 29, 1917, to March 23, 1918, amounted to $3,013.52, which increased expense was incurred through no fault or neglect on the part of the plaintiff, nor was said increased expense contemplated by either the plaintiff or the defendants at the time of the execution of the first purchase orders and memorandums. That said expense was caused solely by the increased demands of the defendants and their failure and delay to furnish the goods for treatment in accordance with their own demands and agreements, which caused said expenditure in the sum of $3,013.52, as shown in Exhibit No. 24 which is hereto
21 attached and made a part hereof, which sum is due the plaintiff and unpaid.

Sixth Cause of Action.

Allowance on Chemicals and Materials Left Over After Suspension of Work.

As a further and sixth cause of action, plaintiff alleges that for the treatment of the goods as provided for in said purchase orders, memorandums and demands, it was necessary for the plaintiff to procure and employ certain chemicals and materials in quantities sufficient for the performance of the service required therein in the regular course of business and according to the understanding and agreement of both parties. That at the time of the cancellation and annul/ment of said orders and demands, the plaintiff had on hand large quantities of these chemicals and materials so purchased for the treatment of the yardage then untreated. That in accordance with the regulations of the War Department and with subsequent instructions received by the plaintiff from the agents of the defendants, an inventory was made for the purpose of determining the amount of said chemicals and materials remaining in the possession of the plaintiff and unused after the cancellation and annul/ment of said orders and demands. That such inventory was made by the agents of the defendants acting with the plaintiff on or about the 23rd day of April, 1919, who then determined the value of the same at the market price at that time. That the inventory so made by the defendants showed a much lower value than the cost of the chemicals and materials to the plaintiff when purchased by it in accordance with the provisions of the orders and demands, and that by reason of the cancellation of the orders and the cessation of operations, the plaintiff was compelled to lose and did
22 lose the difference between the cost of said chemicals and materials and the market value thereof at the time of said inventory. That the difference between this cost of the chemicals and materials and the market value thereof at the time of the inventory was a loss caused to the plaintiff by the acts and demands

of the defendants, and the cancellation of the contracts, and was not due to any extent to the acts of the plaintiff, and that the loss so sustained by the plaintiff, as determined by said inventory, is the sum of $3,877.87, no part of which has been paid, a copy of which inventory is set out in Exhibit No. 25, which is hereto attached and made a part hereof.

Seventh Cause of Action.

Increased Plant Facilities.

As a further and seventh cause of action, the plaintiff alleges that each and all of said series of purchase orders, memorandums and demands were entered into and made by the agents of the defendants and the plaintiff, with a full knowledge and understanding of the capacity and facilities of the plaintiff's plant and business at the time that the demands were first made by the defendants for the treatment of the goods in question. That the price per yard for the treatment of the goods was fixed and agreed to upon the conditions existing and the understandings had during the summer of 1917, and soon after war was declared as above described. It was then understood that the purchase orders, memorandums and demands would be reasonably regular and continual during the prospective period of the war, which as then supposed by both parties would not be less than three years and might possibly extend beyond that period. That the plaintiff in compliance with the demands
23 of the defendants immediately and from time to time made full and ample preparations to perform the services as they should be required, and purchased the necessary materials, machinery, facilities and equipment. The defendants, however, although well knowing the capacity, facilities, equipment and machinery of the plaintiff then prepared and ready to perform the services as understood and required when the orders were first given, soon began to demand an increased production of material and an increased amount of machinery and facilities, so as to treat continuously a larger and an increasing amount of goods over and beyond the amount considered by both parties at the beginning of the period of performance. That in accordance with said increased and continual demands, the plaintiff made extra preparations and purchased additional machinery, so as to comply with the increased demands of the defendants, but that the defendants by reason of the irregular and inconstant use of the finished material by the War Department failed to furnish a regular and constant supply of material for treatment, and failed to give regular and ordinary shipping instructions, so that at various times during said period the amount of material on hand for treatment was in excess of the capacity of the plant as known by the defendants, and at other times the amounts so furnished fell short of the amounts required for constant use of the plant with all its machinery and facilities. That the purchase orders, memorandums and demands contained no provisions for their cancellation prior to the complete performance

of each individual order, but that when the orders were cancelled and performance ceased on or about the 19th day of November, 1917, only about 46 per cent of the total amount of goods as originally provided for in said orders and demands had been treated by the plaintiff, and that about 54 per cent of said total amount so provided for remained untreated, to the great loss and damage of this plaintiff.

That by reason of said extra amounts of machinery, facilities
24 and equipment so purchased and paid for by the plaintiff to meet the extraordinary demands of the defendants, the plaintiff has suffered and incurred great and heavy loss. That the total loss so incurred by the said plaintiff after deducting any and all salvage and incidental values of said facilities machinery and equipment so bought solely at the continuous demands of the defendants, was the sum of $23,613.56 and no less, which amount is due and unpaid, which items are set out in Exhibit No. 26, which is attached hereto and made a part hereof.

Eighth Cause of Action.

Deductions Made by Defendants Because of Increased Yardage Resulting from Treatment and for Alleged Loss in Shipment.

As a further and eighth cause of action, plaintiff alleges that an increase in the yardage occurred when the goods so treated passed through the dyeing and water proofing processes in ordinary treatment. That such an increase of yardage caused an additional use of chemicals and materials, and that when such treatment was completed the total yardage was approximately 2 per cent greater than existed before treatment. That during the progress of the earlier orders the plaintiff had calculated the charge for the treatment of said increase and billed the defendants for the same as the various amounts of goods were completed and shipped. That defendants paid such bills as rendered, including said charge for such increase, in accordance with the usual custom and understanding between the parties, but that under date of October 16, 1918, the defendants

refused to accept and pay thereafter for the treatment of any
25 goods in excess of the gray goods shipped to and received by the plaintiff. That it had been verbally agreed prior to said date between the plaintiff and the defendants that in order to protect defendants from various contractors to whom the treated goods would be shipped, that said increase should be shown in the final amounts treated, and that the treatment of the same should be charged to the defendants, who agreed to pay for the same. That in accordance with this verbal agreement, plaintiff continued to render bills to the defendants as the various amounts of goods were completed, including the charges for treating the increase in yardage, and that the defendants before payment of said bills after said October 16, 1918, deducted the amount so charged for the treatment of said increase. That the defendants accepted the finished goods so shipped, including the increase in yardage, but have failed and refused to pay for the treatment of said increased yardage, as was

agreed upon when the purchase orders and memorandums were entered into, which amounts so deducted are the sum of $848.96, and which amounts are set out in Exhibit No. 27, which is attached hereto and made a part hereof.

Plaintiff further alleges that under Contract No. 1082-N it had completed the treatment of 63 rolls of duck containing 6,342¼ yards, in accordance with the specifications stated therein. That following the shipping instructions furnished by and received from the defendants, the plaintiff delivered the said treated goods to the New York Central Railroad Company on July 15, 1918, for shipment, consigned f. o. b. Poughkeepsie to Jeffersonville, Indiana, and received the usual receipt and release from further liability from said Railroad Company, all in accordance with the orders of the defendants. That prior to said shipment the said treated goods had been duly inspected and accepted by the agents of the defendants and found satisfactory as to quality and correct as to number
26 of rolls and amount of yardage. That subsequent to such inspection and acceptance and subsequent to the delivery to said Railroad Company, and subsequent to the payment in full by the defendants of the bill rendered by the plaintiff therefor, the defendants claimed a shortage in said shipment of one roll of goods containing 104½ yards, and demanded that they be reimbursed by the plaintiff in the sum of $105.13, because of the alleged loss of said roll of goods. That in order to secure the payment of other large sums then due to the plaintiff from the defendants, the plaintiff complied with said demand and reimbursed the defendants to the amount of the above sum, although acting under protest and knowing that the same was not rightfully due. The plaintiff further alleges that the shipment as delivered to and accepted by the Railroad Company contained the full amount of goods, both as to the number of rolls and the number of yards contained therein, as called for in the shipping instructions furnished by the defendants, the report of the defendants' inspector at the plant, and as shown by the records of the plaintiff and the receipt given by the Railroad Company, and that the plaintiff was rightfully entitled to receive and to retain the full amount of the bill as rendered and paid for the services performed in the treatment of the goods in said shipment. That said difference in yardage could have occurred only by a mistake in the subsequent inspection by the agents of defendants, or by a loss subsequent to the delivery by the plaintiff to the defendants and after the responsibility of the plaintiff had ceased. That the defendants wrongfully demanded the reimbursement of the above sum of $105.13 so paid under protest, and have since failed and refused to repay the same, which together with the deductions made because of the increased yardage resulting from treat-
27 ment in the sum of $848.96, as above alleged, amount to $954.09, all of which is due and unpaid.

Ninth Cause of Action.

Insurance Premiums Paid by Plaintiff in Excess of that Provided for.

As a further and ninth cause of action, plaintiff alleges that under the provisions of the purchase orders and memorandums, the plaintiff was required to protect all goods, both treated and untreated, by insurance while in its possession. That because of the irregular manner in which the defendants supplied gray goods, and because of the delays on the part of defendants in furnishing the necessary shipping instructions, plaintiff was required to store variable quantities of said goods and for various periods of time, and in accordance with the requirements of the orders plaintiff insured all of the goods received both before and after treatment in variable amounts, but by agreement the aggregate amount of said insurance carried at any one time in the name of the Company was not too exceed $300,000.00. That because of the frequent changes in the amount of goods held in storage the plaintiff was compelled constantly to change the amount of insurance carried from day to day. That in accordance with the custom and the provisions of said orders, the plaintiff during the early part of the specified period insured said goods and named itself as the beneficiary in each of the insurance policies, as it had a right to do, but not in excess of said $300,000.00. That on or about the first of the year, 1918, the plaintiff was notified by the defendants that on account of the peculiar interest of the defendants in said goods, and the conditions growing out of the
28 war, said insurance policies should thereafter be changed so as to name the defendants as the beneficiary, and that after said date all insurance policies were made out in favor of said defendants because of the specific demands therefor. The plaintiff was also notified on the above date by the defendants to disregard the maximum of $300,000.00, and to carry insurance thereafter to the extent of the full value of the goods held in its possession, all of which the plaintiff did, thereby causing it to contract for and pay premiums on an additional amount of insurance over and above the maximum originally established by agreement. That after said policies had been changed so as to name the defendants as beneficiary therein, the premiums which the plaintiff was required to pay were further increased because of the delays on the part of the defendants in cancelling the policies after the goods insured had been removed from the plant.

Plaintiff further alleges that under and by virtue of the provisions of the purchase orders and memorandums, said insurance policies were originally taken out in its favor at the rate of 17-38/100c. per $100.00, as named by the insurance company, but that when required to name the defendants as the beneficiary in said policies, the plaintiff was required to pay and did pay 55c. per $100.00. That because of said large increase in the rate of insurance demanded of the plaintiff over and above and outside of the agreements, and because of the additional amount of insurance carried in

excess of the maximum of $300,000.00, and because of the defendants' delay in the cancellation of the policies, the plaintiff was required to expend and did expend the sum of $2,960.68, in excess of the amount of said insurance required at the contract rates when the plaintiff was named as the beneficiary therein. That plaintiff thereby suffered a loss and expense to the extent of $2,960.68
29 caused solely by the orders and delays of the defendants and not within the agreements between the parties, all of which remains due and unpaid; the amount of said excess premiums charged to each order is set out in Exhibit No. 28, attached hereto and made a part hereof.

Tenth Cause of Action.

Loss to Commercial Business.

As a further and tenth cause of action, plaintiff alleges that during a number of years prior to 1917 the plaintiff had built up a large and profitable business in the treatment of goods for the purpose hereinabove specified. That it had dealt with many regular customers for a long period of time, and that the demands for its services were constantly increasing, and that said business was at the time war was declared with Germany, extensive, permanent and profitable to the plaintiff.

Plaintiff further alleges that because of the peculiar demands of the War Department and the extraordinary needs for the goods so treated by the plaintiff in the prosecution of the war, the defendants demanded that the plaintiff devote its entire plant, including all of its facilities, equipment and organization to the exclusive use of the defendants and to submit such facilities, equipment and organization to the series of purchase orders, memorandums and demands, as above set out. that in order to facilitate the performance of said orders, the defendants kept one or more of its agents stationed at the plaintiff's plant, who then and there supervised the performance of said orders and insisted upon the plaintiff excluding from its plant all other work and upon the cancellation of its former business, and that it refrain from soliciting and contracting for other business in its regular line of performance during the period of
30 the prosecution of the war, which as then understood by the parties would be not less than three years, but perhaps for a longer period. That plaintiff's plant was thus practically and in effect taken over and commandeered by the defendants for the use of the War Department during such prospective continuance of the war, and that the defendants by such demands for an exclusive operation of the plant and its facilities in the preparation of such materials for their use, utterly destroyed plaintiff's established trade and business, and entirely interfered with and hindered plaintiff's prosecution of the same during the continuance of said orders, and rendered plaintiff's opportunity for readjusting and restoring said business after the cancellation of said orders extremely difficult, expensive and of long duration.

That soon after the termination of said orders a large portion of the goods so treated by the plaintiff and unused by the defendants, together with large quantities of similar goods treated by other contractors and held in storage by the defendants, were put upon the open market and sold at publbic auction by the defendants, thus at that time and for a long time thereafter supplying the demand, a large part of which otherwise might and would have been supplied by the plaintiff after the resumption of its business. That such sale and distribution of these goods vitally affected the market conditions and prevented the plaintiff from resuming its business in the ordinary course of trade and time, as the market was supplied and the prices reduced because of the sale of said goods by said defendants.

Plaintiff further alleges that the market for the goods treated by its processes always has been and necessarily is extremely limited, and that any unusual or extraordinary overloading of such market would cause and did cause a decline in the demand for plaintiff's
31 services when the plaintiff was again at liberty to resume its business upon the termination of the orders, which increased and prolonged the loss thus sustained by the plaintiff in the taking over of its plant and facilities by the defendants, and the sudden cancellations of the contracts, and the supplying of the open market with the goods on hand and unused after the orders were cancelled.

That the value of said plant, its facilities and business at the time the defendants as such war measure demanded and appropriated the same as hereinbefore alleged, amounted to $375,000.00, and not less. That immediately after the termination of the orders by the defendants, as above alleged, the plaintiff began to restore and rehabilitate its business and in this effort used the utmost diligence, energy and skill. That because of the enforced cancellations of the plaintiff's relations with its former customers, and by reason of the overloaded condition of the markets because of the auction sales of treated goods without any consideration as to the effect upon the losses of the plaintiff, which were greatly increased thereby, the plaintiff found great difficulty and delay in regaining any part of said lost business or in acquiring new business, although fully prepared to accept and perform the same.

That the appropriation of said plant and its facilities, together with the destruction of the plaintiff's business, as aforesaid, caused great and continuous losses to the plaintiff, not included in any of the causes of action hereinbefore set out, and not including any loss of prospective or possible profits on any part of the orders beyond the goods and supplies delivered to and accepted by the United States, but which are shown in the expenditures necessarily made, in the obligations and liabilities incurred and discharged in performing and preparing to perform said orders and extraordinary demands, in the destruction of the established business and
32 the expenses incurred in the efforts to regain and re-establish the business when the markets had been supplied as aforesaid, all of which losses amount to the sum of $590,000.00, and no less, and which losses were caused directly by the acts of the defendants

as hereinbefore set out, and were not caused by any acts, faults or failures on the part of the plaintiff, and which amounts are due from the defendants and unpaid.

That the plaintiff is the owner of said claim, and no assignment or transfer of said claim or any part thereof or interest therein has been made, and the plaintiff has at all times borne true allegiance to the Government of the United States.

Wherefore the plaintiff prays judgment against the defendants in the sum of $641,313.64.

S. S. ASHBAUGH,
Attorney for Plaintiff.

Verification.

STATE OF NEW YORK,
County of Dutchess:

W. B. Price, being first duly sworn, deposes and says that he is the General Manager of the Price Fire and Water Proofing Company, the plaintiff above named; that he has read the above and foregoing petition attached hereto and knows the contents thereof, and that the facts therein stated are true as he verily believes.

WILLIAM B. PRICE.

Subscribed and sworn to before me this 31st day of August, 1920.

[SEAL.] THOMAS F. PURCELL,
Notary Public.

33 EXHIBIT 2.

Address all official communications to the officer in charge Quartermaster Purchasing and Manufacturing Office.

War Department,

Quartermaster Purchasing and Manufacturing Office,

18th and D Streets N. W.,

Washington, D. C.

Order No. 282-*N.*

November 26, 1917.

No.: 423.8.
From: Officer in Charge.
To: Price Fire & Waterproofing Co., Poughkeepsie, N. Y.
Subject: Order for Coloring and Waterproofing.

1. In accordance with your offer, order is given you for coloring and waterproofing by the Emla A Process:

Approximately:

14,000 yards No. 6 Duck as follows:

Approximately 6,000 yds., 42" width to be colored and waterproofed ..... @ $.145 per yard.
4,000 yds. 60" width to be colored and waterproofed ..... @ $.192 per yard.
4,000 yds. 72" width to be colored and waterproofed ..... @ $.226 per yard.

2. The Duck will be shipped to you by express on Government B./L. by the Depot Quartermaster, Baltimore, Md., and the Duck to be delivered to this Corps f. o. b. Poughkeepsie, N. Y., is to be inspected and accepted at your mills.

3. Delivery is to be completed within 15 days from receipt of material by you.

4. It will not be necessary to execute formal contract papers under this order, nor will bond be required; it, however, being understood that the goods will be insured while in your possession in amount not less than $18,000.

5. This purchase order will be numbered "282-N." Pay-
34 ments will be made by the Depot Quartermaster, New York, N. Y., who will have entire charge of the order.

6. Please acknowledge receipt.

(Signed) H. J. HIRSCH,
Colonel Q. M. Corps, H. M. S., in Charge.

Zkr-J.

All shipping packages, shipping receipts & bills of lading should be marked in large type "Military Supplies for the Army. Rush!"

Address all official communications to the officer in charge Quartermaster Purchasing and Manufacturing Office.

War Department,

Quartermaster Purchasing and Manufacturing Office,

18th and D Stre-ts N. W.,

Washington, D. C.

No. 423.8. December 18, 1917.
From: Officer in Charge.
To: Price Fire & Waterproofing Co., Poughkeepsie, N. Y.
Subject: Order No. 282-N.

1. Referring to communication from this office of the 26th ultimo, Order No. 282-N in your favor, for coloring and waterproofing 14,000

Yds. Duck, you are informed that the said order is hereby change to provide for this Duck to be No. 4 instead of No. 6 Duck.

2. All other terms and conditions of said order are to remain un changed.

3. Please acknowledge receipt.

(Signed) H. J. HIRSCH,
H.,
Colonel Q. M. Corps, H. M. S., in Charge.

Zkr-LN.

35 All shipping packages, shipping receipts & bills of ladin should be marked in large type "Military Supplies for th Army. Rush!"

Supply & Equipment Div.,

18th & Va. Ave. N. W.,

Washington, D. C.

Address reply to Quartermaster General, Washington, D. C.

War Department,

Office of the Quartermaster General of the Army,

Washington.

March 4th, 1918.

No.: 423.8 SE.
From: Purchasing & Contracting Officer, S. & E. Div.
To: Price Fire & Waterproofing Co., Poughkeepsie, N. Y.
Subject: Correction—Order No. 282-N.

1. Referring to your order No. 282-N for dyeing and waterproofi Duck, you are informed that the said order is hereby changed provide that instead of dyeing these goods by your "Elma A" proces you are to dye and waterproof these goods by your "Repelite" proces in a manner satisfactory to the contracting officer; the 60-in. No. Duck (of which there are 1,200 yards) to be dyed and finished $.18 per yard; and the 72-in. No. 4 Duck (of which there are 1,3(yards) at $.2115 per yard.

2. All the other terms and conditions of the said order are to r main unchanged.

PURCHASING AND CONTRACTING
BRANCH.
(Signed) By H. J. HIRSCH,
H.,
Colonel Q. M. Corps, H. M. S., Chief of Branch.

Zkr—v.

Official copy to the Depot Quartermaster, New York, N. Y., for his information.

All shipping packages, shipping receipts & bills of lading should be marked in large type "Military Supplies for the Army. Rush!"

36 EXHIBIT 10.

Contract No. 920-N.

Supply & Equipment Div.,
18th & Va. Ave. N. W.,
Washington, D. C.

February 14th, 1918.

423.2—145 SE.
Purchasing & Contracting Officer, S. & E. Div.
Price Fire & Waterproofing Co., Poughkeepsie, N. Y.
Award of contract.

1. In accordance with your offer, contract is awarded you for waterproofing by the "replelite" process, in a manner satisfactory to the contracting officer, the following:

Approximately 1,800,000 yards 36-in. No. 6 Duck (these goods were woven 72-in. and have been split at the mills, making them 36-in. wide), to be dyed and waterproofed, at $.1069 per yard.

These goods to be delivered in the grey under contract with J. H. Lane & Co. (West Boyleton Mills), East Hampton, Mass., contract No. 325-B. Delivery of the grey goods as follows: 200,000 yards monthly February to October, 1918, inclusive. This delivery, however, is not guaranteed by the Government. Delivery of the finished goods to be made within ten days from receipt of the grey goods by you.

2. The grey goods are to be shipped to you by the Depot Quartermaster, Boston, Mass., and invoiced by him to the Depot Quartermaster, New York, N. Y. They are to be received by you f. o. b. Poughkeepsie, N. Y., and the goods after dyeing and finishing to be delivered by you f. o. b. cars, Poughkeepsie, N. Y., but billed to the Depot Quartermaster, New York, N. Y., for payment. You are to be liable for any loss of, or damage to, any of the materials furnished by this Corps, from any cause whatsoever, while in your possession. The Depot Quartermaster, New York, N. Y., will, after inspection of the waterproofing and finishing, invoice and ship these goods from your city to the Depot Quartermaster, Jeffersonville, Ind., for manufacture into tarpaulins.

37 3. No charge for baling. The goods are to be insured by you while in your possession at $.94 per yard for the 36-in. width. Bond for the faithful fulfillment of this contract, therefore, is hereby waived.

4. Any seconds because of grey goods to be charged for at regular price. Any seconds because of finishing faults to be charged for at one-half the price up to a quantity not exceeding three per cent (3%) of the grey goods.

Any seconds because of finishing faults beyond three per cent (3%) are to be charged to you at the price of the grey goods, or to be adjusted between the contracting parties.

5. This contract will be dated February 13, 1918, and numbered "920-N." Payments thereunder will be made by the Depot Quartermaster, New York, N. Y., who will have entire charge of the contract.

6. Please acknowledge receipt.

PUCHASING & CONTRACT SECTION,
(Signed) By H. J. HIRSCH,
Colonel Q. M. Corps, Chief of Section.

Zkr—v.

Q. M. C. Form No. 115.
Authorized April 23, 1913, amended February 26, 1916.
R. L.
920-N.

Contract for Miscellaneous Services.

To be used for purchase of water, gas, etc., and for engagement of such services as wagon transportation, shoeing animals, furnishing towels, laundering, drayage, hauling, ferry service, stevedoring, scavenger service, removing ashes and waste, disposal of garbage, etc. (The form will not be used in making contracts for construction and repair of public works, for electric current, or for telephone service.)

Between Colonel H. J. Hirsch, Quartermaster Corps, U. S. A., and Price Fire & Waterproofing Co.

For Dyeing and waterproofing 36-in. No. 6 Duck For Quartermaster Corps, U. S. Army.

Date of Contract Feb. 13, 1918. Appropriation and
38 Amount S. S. & T. Q. M. C., 1918, $192,420.00.
Date Effective February 13, 1918. Date Expires —.

Sureties waived. Penalty of bond, $—.

These articles of agreement, entered into this 13th day of February, 1918, between Colonel H. J. Hirsch, Quartermaster Corps, U. S. Army, for and in behalf of the United States of America, of the first part, and Price Fire & Waterproofing Company (a corporation existing under the laws of the State of New York), of Poughkeepsie, in the County of Dutchess, and State of New York (hereinafter designated as contractor, of the second part, Witness:

That the said parties do hereby mutually covenant and agree to and with each other—referring to any advertisement, circular to bidders, specifications, etc., hereto attached, or referred to herein, or

pertaining hereto, and which, so far as they are applicable, form a part of this contract, as follows:

1. That the contractor shall furnish the supplies and services, either or both, specified below, in the manner, at the rates or prices, at the place or places and at the time or times during the period commencing with the 13th day of February, 1918, and ending with the — day of —, 19—, as follows:

The contractor shall dye and waterproof the quantity of 36-in. No. 6 Duck stated, at the price stipulated and other conditions specified in the letter of award hereto attached.

3. That in the performance of this contract the said contractor shall not, directly or indirectly, employ any person undergoing sentence of imprisonment at hard labor which may have been imposed by a court of any State, Territory or municipality having criminal jurisdiction, nor permit such employment by any person furnishing labor or materials to said contractor for use in fulfillment of this contract.

4. That the contractor shall hold and save the United States, and all officers and agents thereof, harmless from and against all demands of any nature or kind for or on account of the use
39 and continued use of any patented article, combination, or process which may apply to or affect the articles, materials or services furnished under this contract.

5. That for and in consideration of the faithful performance of the stipulations of this contract, the contractor shall be paid, at the office of the contracting officer, or by a disbursing officer designated to make payments, the prices stipulated in Article 1 of this contract, for the supplies delivered and accepted or for the services satisfactorily performed. Payments will be made monthly as a rule, upon bills to be rendered by the contractor, if funds are on hand for the purpose, or as soon thereafter as is practicable.

6. That it is expressly agreed and understood that this contract shall be non-effective until an appropriation adequate to its fulfillment is granted by Congress and is available, except in so far as is necessary to provide for the necessities of the service as authorized by Section 3732 of the Revised Statutes of the United States. However, in order to provide for the necessities of the service as authorized by Section 3732 of the Revised Statutes of the United States, it is agreed that the supplies or services specified herein, so far as authorized by said section, shall be furnished at the times and manner required under this contract, and that payments for the supplies so delivered or services so performed shall be made as soon as is practicable after funds are appropriated and are available.

7. That in case of the failure of the contractor to perform any part of this contract, the party of the first part or his successor shall have the right to supply the deficiency by procurement in open

market, or otherwise, purchasing any of the supplies or services at such place as he may elect, with the view of obtaining the same promptly and at the same time endeavoring to secure fair and reasonable prices the supplies or services procured to be the kind specified herein, as near as practicable under the circumstances obtaining), at the expense of the contractor; and in case failure should occur prior to the time fixed for performance of all parts of the contract, the right is hereby reserved to the United States to elect whether the contractor shall be permitted to continue performance as to such remaining part (deficiency by reason of any further failure to be supplied as above) or whether the entire unperformed part shall be procured at the expense of the contractor. In event, however, of the granting of additional time for performance, the cost of inspection and other expenses and damages to the United States over what would have been incurred had performance been accomplished by the time originally fixed therefor, if any, except in so far as the same may arise from delays for which the United States is responsible, as determined in each of these particulars by the officer in charge or higher authority, shall be charged to the contractor and may be deducted from any money due or to become due said contractor from the United States: Provided, That where additional time has been granted the United States shall also have the right to cause the remaining part of the contract, or any portion thereof, to be taken from the contractor whenever, in the opinion of the officer in charge, reasonable and satisfactory progress is not being made, and to secure completion at the expense of the contractor, including charges as above on account of delays.

8. That there shall be no transfer of this contract or of any interest therein by the contractor to any other party, and in case of the violation of this provision the United States, reserving all rights of action for any breach of this contract by the contractor, may refuse to carry out this contract with either the transferrer or the transferee.

9. That no Member of or Delegate to Congress, or Resident Commissioner, nor any person belong- to or employed in the military service of the United States is, or shall be, admitted to any share or part of this contract, or to any benefit which may arise herefrom, but under the provisions of section 116 of the act of Congress approved March 4, 1909 (35 Stats., 1109), this stipulation, so far as it relates to Members of or Delegates to Congress, or Resident Commissioners, shall not extend, or be construed to extend, to any contract made with an incorporated company for its general benefit.

In addition to the ordinary precautions heretofore adopted by the contractor for the guarding and protection of its/ his/ their plant and work, the contractor shall provide such additional watchmen and devices for protection of its/ his/ their plants and property and the work in process for the War Department against espionage, acts of war and of enemy aliens as may be required by the Secretary of War. The contractor shall, when required, report to the Secretary of War the citizenship, country of birth or

alien status of any and all of its/ his/ their employees. When required by the Secretary of War it/ he/ they shall refuse to employ, or if already employed forthwith discharge from employment and exclude from its/ his/ their works any person or persons designated by the Secretary of War for cause as undesirable for employment on work for the War Department.

Articles 2 and 10 stricken out before signature.

In witness whereof the parties aforesaid have hereunto placed their hands the date first hereinbefore written.

Witnesses:

—— ——, as to

H. J. HIRSCH,
Colonel Quartermaster Corps, U. S. Army.

SAMUEL B. WAINER, as to
By H. W. SCHOFIELD,
Captain Q. M. R. C.

—— ——, as to

PRICE FIRE & WATER PROOFING CO.,

CATHERINE B. HUHN, as to

By W. B. PRICE,
General Mgr.

(Executed in triplicate.)

Notes.

1. The name of the principal intended to be bound as party of the second part, whether an individual, a partnership, or a corporation, should be inserted in and signed to the contract in exactly the same form. An officer of a corporation, a partner, or an agent, signing for a principal should add his name and title after the word "B" under the name of the principal. If the contractor is not a corporation strike out the printed part "(a corporation existing under the laws of the State of ——)" on page 1.

2. All deletions, interlineations, or other changes should be duly explained in the blank space immediately preceding the executing clause, before the contract is signed.

3. The contract is to be executed in triplicate, and at least two copies made—one for the Returns Office and one for the
42 office of the contracting officer. Preferably the contract should be drawn on the typewriter. By the use of carbon paper all numbers and copies can be drafted at one writing.

Address reply to Quartermaster General, Washington, D. C.

Supply & Equip. Div.,
18th & Va. Ave. N. W.,
Washington, D. C.

War Department,

Office of the Quartermaster General of the Army,
Washington, D. C.

April 27, 191

No.: 423.8-145 SE.
From: Purchasing Officer, S. & E. Div.
To: Price Fire & Waterproofing Co., Poughkeepsie, N. Y.
Subject: Supplemental Agreement—contract No. 920-N.

1. Referring to your contract No. 920-N dated February 13, 1 for dyeing and waterproofing 36-in. No. 6 Duck, you are infor that Supplemental Agreement thereto, dated April 27, 1918, be immediately prepared in this office, and forwarded to you execution.

2. This Supplemental Agreement will provide that since a re inspection of your plant revealed the fact that it was badly conge with grey goods, and since it would be more advantageous to and to the Government to dye the April, May and June deliv elsewhere—the April May and June 1918 deliveries, totaling 000 yards No. 6 Duck are hereby cancelled.

3. All the other terms and conditions of the said contract a remain unchanged.

4. Please acknowledge receipt.

COLONEL H. J. HIRSCH,
O. M. Corps, Purchasing Offic

(Signed) By H. W. SCHOFIELD,
Captain Q. M. R. C.

Zkr-v.

Official copy to the Depot Quartermaster. New York, N
for his information. As soon as Supplemental Agree
43 papers are executed, copy of the Supplemental Agree
will be furnished you.

All shipping packages, shipping receipts & bills of lading sh be marked in large type "Military Supplies for the Army. Ru

Q. M. C. Form No. 109-*a*.
Authorized April 23, 1913, amended February 26, 1916.

Supplemental Agreement for Modification of Contract.

#215.

Between Colonel H. J. Hirsch, Quartermaster Corps, U. S. A., and Price Fire & Water Proofing Co., Poughkeepsie, N. Y.
Modifying Contract Dated February 13, 1918 (920-N).
For Dyeing and waterproofing Duck for Q. M. Corps U. S. Army.
Appropriation S. S. & T. Q. M. C. 1918.
Dated Supplemental Contract Apr. 27, 1918.
Amount of decrease $64,140.00.

Whereas, On February 13, 1918, a contract was entered into between the United States, represented by Colonel H. J. Hirsch Quartermaster Corps, U. S. Army, and Price Fire & Waterproofing Co. (hereinafter designated as contractor), for Dyeing and waterproofing Duck for Quartermaster Corps U. S. Army.

And Whereas, It is found advantageous and in the best interests of the service of the United States to modify the provisions of said contract, as specified below:

Now, Therefore, It is hereby agreed that the provisions of said contract shall be changed in the following particular, and in these respects only, and in consideration thereof the contractor shall receive Sixty-four thousand, one hundred and forty (64,140) Dollars less than stipulated in said original contract, viz:

The changes to apply, being those specified in (*a*) the copy of notice of supplemental agreement dated April 27, 1918, hereto attached.

44 Witness our hands this 27th day of April, 1918.

——— ———, as to
H. J. HIRSCH,
Colonel, Quartermaster Corps U. S. A.,

S. NELSON, as to
By S. W. SHAFFER,
Captain Q. M. R. C.

C. A. OWENS, as to
PRICE FIRE & WATERPROOFING CO.,
By W. B. PRICE,
General Manager.

(Executed in triplicate.)

Notes.

1. A contracting officer will obtain the necessary authority therefor, in each case, before entering into a supplemental agreement for modification of a contract.

2. The name of the contractor will be inserted in and signed at the end of the supplemental agreement in the same form as in the original contract.

3. If the change in the delivery or work is such as to require a ditional time for full performance of the contract, a fair and reaso able extension of time will be granted, the time limit of which w be definitely inserted in the supplemental agreement. Where extension is so specified it will be assumed that no additional ti for performance will be required on account of the modification the original agreement.

4. When interlineations, deletions, or other changes or alte tions are made, specific notation of the same will be made over t signature of the parties to the agreement.

5. If the assent of the sureties is executed by a surety compan affix the corporate seal; if executed by individuals in Maine, Mass chusetts or New Hampshire, or the contract secured by the bond to be performed in those States, affix adhesive seals.

6. Supplemental agreements will be executed in triplicate, and least two copies made—one for the files of the contracting offic and one for the Returns Office. Preferably the agreement will drawn on the typewriter, and all numbers and copies made at o writing.

45 *Supplemental Agreement No.* 2184.

Affecting Contract 920-N

Supplemental agreement entered into this 13th day of Septemb 1918, between S. W. Shaffer, Captain, Quartermaster Corps, Unit States Army, (herein called "contracting officer"), party of the fi part, for and on behalf of the United States of America, and Pri Fire & Waterproofing Co., a corporation existing under the laws the State of New York, located at Poughkeepsie, County of Dutche State of New York, (herein called "contractor"), party of the seco part:

Whereas, a certain contract was entered into between the part hereto, No. 920-N and dated February 13, 1918, (herein call "original contract") for the waterproofing by the "repelite" proc in a manner satisfactory to the contracting officer of approximat 1,800,000 yards 36" #6 Duck, to be dyed and waterproofed at $.10 per yard, and

Whereas, by a supplemental agreement entered into between t parties hereto and dated April 27, 1918, the foregoing contract w modified to the extent of reducing the number of yards to be dyed a waterproofed as called for in the original contract from appro mately 1,800,000 yards to approximately 1,200,000 yards, and

Whereas, it is mutually desired between the parties hereto that t said original contract be further modified to the extent of further ducing the said number of yards to be dyed and waterproofed un said contract from approximately 1,200,000 yards to approximat 835,621 yards and said approximately 364,379 yards so cancell

be deducted as follows: 200,000 yards from the July delivery and 164,379 from the August delivery, and

Whereas, it is to the best interest of the United States Government to modify the original contract as outlined in the preceding paragraphs, and the contracting officer having recommended that such modification be made.

Now, therefore, in consideration of the premises and the mutual covenants herein contained, it is hereby agreed between the parties hereto as follows:

46 I. That the original contract be and the same hereby is modified to the extent of reducing the number of yards to be dyed and waterproofed as called for in the original contract and as reduced by supplemental agreement entered into between the parties hereto and dated April 27, 1918, from approximately 1,200,000 yards to approximately 835,621 yards, said approximately 364,379 yards so cancelled by this agreement to be deducted as follows: 200,000 yards from the July 1918 delivery and 164,379 yards from the August 1918 delivery.

II. That all other terms and covenants of the original contract shall remain in full force and effect and apply to this agreement as though herein written in full.

III. That any and all debts, liabilities, claims or causes of action, if any, arising between the parties hereto, one against the other, by reason of or arising out of the aforementioned modification of the original contract, are hereby released and discharged.

In witness whereof, the parties aforesaid have executed and delivered this agreement in triplicate as of the date first hereinbefore written.

Witness:

C. R. BUTLER, as to

S. W. SHAFFER,
Captain, Quartermaster Corps.

C. A. OWENS, as to

PRICE FIRE & WATERPROOFING CO.,
By W. B. PRICE,
General Manager.

CKB.
2.

47 II. *General Traverse.*

Filed Nov. 29, 1920.

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand or defense in the premises, having been entered on the part of the defendant, a general traverse is entered as provided by Rule 34.

III. *Argument and Submission of Case.*

On October 12, 1921, this case was argued and submitted on merits by Mr. S. S. Ashbaugh, for the plaintiff, and by Mr. Alexander H. McCormick, for the defendant.

48 IV.

Findings of Fact and Conclusion of Law.

Entered October 31, 1921.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following:

Findings of Fact.

I.

The plaintiff is a corporation duly organized, existing, and doing business under and by virtue of the laws of the State of New York, and its place of business has been for many years and now is in the city of Poughkeepsie, in said State. Its business is the treatment of cloth by dyeing, waterproofing, and fireproofing, preparing, and rendering such cloth in proper condition to be used as curtains in theaters and other similar places, for tents, wagon covers, tarpaulins, gas-mask covers during the time of war, and other similar purposes, using therein and therefor the different grades of duck or canvas furnished for said treatment, using therefor various original chemical processes, and treating the same specially in three different processes called Emla A, Repelite, and Paraffin.

II.

Plaintiff's predecessor company, the Price Fire Proofing Company, was incorporated in 1904 with a capital stock of $300,000. Its purposes were similar to those of the plaintiff company, but its efforts in the beginning were directed more particularly to fireproofing. Its processes, assumed in the beginning to be complete, had to undergo experimentation and further development and the experimental and introductory stages continued until 1912. By that time the company's fireproofing process was recognized as a superior one, much of the business in that line was acquired, and its waterproofing process was becoming well recognized; but its plant was not sufficiently equipped to make a commercial success of the business, and a new plant had to be provided or the enterprise abandoned.

All of the $300,000 of stock had been issued and fully paid. The formulas or processes were regarded at the organization of the
49 company as worth one-half of the capitalization and the other half of the stock was sold to procure means with which to develop and establish the business. There was in 1912 no sufficient

capital available or remaining stock which might be sold to enable the erection of a new plant and for purposes of reorganization the plaintiff company was incorporated in October of that year with a capitalization of $375,000, the assets and liabilities of the old company being taken over as representative of $300,000 of the stock of the new company and the increased capitalization furnishing an increase of $75,000 in available capital.

A new plant was built and about January, 1913, a new machine installed which had been contracted for under a certain guaranty as to production. When put in operation this machine did not fulfill the guaranty and, as a result of its attempted operation, so much goods was spoiled and there was so much delay in getting it out that the company lost its contracts and substantially lost its business.

Prolonged litigation resulted, during which the company was not able to reequip or reestablish its business. The litigation was finally terminated in favor of the plaintiff, its machinery was remodeled so as to make it usable and business from old customers was gradually recovered so that by 1916 the company was doing a substantial and growing business, and until October of that year operated profitably.

In October of 1916 the plant was destroyed by fire. Speedy adjustment of insurance enabled the rapid restoration of the plant to such an extent that one machine was put in operation by January of 1917 and the plant was gradually completed during that year, so that by the first of November one complete equipment was in place, beside the machine known as the grease machine. About or before this time and under these conditions the matter of taking up work for the United States came up for consideration and action. To what extent the plaintiff had then regain a commercial business is not shown.

III.

Soon after the declaration of war against Germany the United States was in need of cloth treated by fire and water proofing processes such as those practiced by the plaintiff company. The plaintiff's general sales manager sought the business and submitted samples. The committee in charge under the Council of National Defense, known as the cotton goods committee, was seeking sources of supply. The plaintiff was invited to send a representative for a conference and sent its president, William B. Price. At the request of Mr. Millar Wilson, representing the committee, Mr. Price made up and submitted a schedule of prices for the treating of various weights and widths of materials by the treatment known as "Emla A." After acceptance of the proposition based on this treatment it was concluded that this process was too slow and would not give sufficient output and that the Repelite process would be satisfactory and permit of a greater output, and Mr. Price submitted prices on the Repelite process which were accepted. Request was made for submission of statement as to capacity of plant, what could be done toward increasing capacity, and when work could commence. Sub-

sequent conferences were held. At one such, when Mr. Price
50 was accompanied by Mr. Barker, the treasurer of the company, and when other representatives of the United States than Mr. Wilson, including Major Hirsch, of the Q. M. Corps, chief of the purchasing and contracting branch of the Supply and Equipment Division, were present, statement was submitted as to the capacity of plaintiff's plant and the character of the goods, and it was agreed between plaintiff's representatives and Mr. Wilson that the plant should be at the disposal of the Government from and after January 1, 1918. It was also understood that during the months of January, February, and March the Government would send the plaintiff 300,000 yards of duck in the gray, of various weights and widths, for treatment, at the prices agreed upon, and that orders would from time to time be issued, but that without waiting for further instructions they were to prepare to proceed with the work.

IV.

From time to time various instruments were issued to the plaintiff in the form of authorizations and orders and notices of awarding of contracts, all with reference to the treatment of stated amounts of gray goods and accepted by the plaintiff; and also from time to time there were various modifications and partial cancellations of these orders and so-called supplemental agreements and orders, directions, and modifications were also given by telephone and telegraph. The instruments in the form of orders or authorizations or otherwise, designed to procure the treatment by plaintiff of gray goods for the defendant were twenty in number, were issued between November 14, 1918, and November 19, 1918, and authorized or directed the treatment in the aggregate of 6,254,714 lineal yards of material. There were twenty-eight supplements or corrections or modifications issued by which the amount of yardage to be treated was reduced by 2,960,199 yards, leaving to be treated in the aggregate, under the modified authorizations or orders 3,294,515 yards. At the prices per yard agreed upon, which varied according to the width and weight of the material, the cost of treating the amount and kind of goods embraced in the twenty orders or authorizations would have been $777,916.54, which, by reason of the changes, modifications, and cancellations, was reduced to $377,654.85. After the cessation of hostilities on November 11, 1918, the defendant canceled all orders then unfilled, up to which time the plaintiff had treated 2,866,622 yards, for which the plaintiff was from time to time paid in accordance with the prices agreed upon and stated in the orders.

The various orders or authorizations referred to were not executed in the manner provided by law and were in an irregular and unauthorized form.

V.

The plaintiff had notified its customers that its entire plant was to be at the service of the Government after January 1, 1918, and had declined to take on any private business thereafter and had

canceled contracts and orders to be performed after that time. It was anticipated by plaintiff that if the goods came on for treatment as provided the entire capacity of the plant would be devoted
51 to Government work from January 1st, and their regular customers had been notified that they could not be taken care of after that date. In anticipation also of this work some additional help had been taken on as a nucleus of a night force in compliance with a suggestion that they prepare for a twenty-four-hour operation of the plant. Goods were not furnished for treatment by January 1st, in consequence o fwhich the plant remained idle for a time. Some of the orders referred to were received about this time and they contained conditions which the plaintiff did not understand were a part of their agreement when prices were submitted, and plaintiff's representatives sought an interview with Mr. Wilson, in which they stated that these additional requirements would increase cost and would take away every element of profit and that they did not want the orders under the conditions imposed. They were informed by Mr. Wilson that the Government had to have their production and was authorized by law to take over their plant, but would prefer for them to operate it, and if they refused it would probably result in a commandeering of their plant, and they would render themselves liable to criminal prosecution. Promise was made by Mr. Wilson that if they would go ahead and do the best they could prices would be so arranged in subsequent orders as to care for the unanticipated requirements.

Goods were not delivered for treatment in any considerable quantities until the latter part of March, when the entire quantities due for January, February, and March were delivered in one lot.

VI.

The defendant shipped the gray goods to the plaintiff for treatment in irregular quantities and at irregular times, sometimes failing to supply enough to keep the plant in full operation but at other times shipping in larger lots than could be promptly treated and thereafter directing reshipments to other plants, and required the plaintiff, in such cases, to haul and rehaul these goods and to furnish storage for large quantities thereof, causing an additional expense to the plaintiff by reason thereof in the sum of $2,147.05. The goods referred to herein as hauled, stored, and rehauled were never treated by the plaintiff.

VII.

When treatment of goods was finished and they were ready for shipment the defendant was notified of that fact and issued to the plaintiff shipping instructions, accompanied by bill of lading. Delays frequently occurred in issuing bills of lading and shipping instructions, and plaintiff was compelled during such period of delay to furnish storage for finished goods, for which it was understood it would be compensated. The storage so furnished at the agreed price amounted to $544.60.

VIII.

In compliance with the demands of the defendant that the plaintiff should provide additional storage room it constructed a warehouse, which after the cessation of Government work was of no more
52 than salvage value to it, and upon demand for the furnishing of still further storage facilities it caused to be vacated a house then producing a rental income of $47.00 per month, and at considerable expense altered it so as to make it suitable for storage purposes and has derived no income therefrom since the cessation of Government work, all to the expense and loss of the plaintiff in the sum of $11,249.16.

IX.

In compliance with demands of the defendant for additional protection for a considerable amount of its goods left in storage with the plaintiff after the cessation of Government work the plaintiff employed extra watchmen not needed by it for its own purposes, and by direction of the defendant erected an iron fence around its plant of no value, except salvage, to it, and thereby incurred an additional expense in the sum of $2,953.11.

X.

In compliance with the direction of the defendant that the plaintiff should prepare for increased production and to that end should prepare for a twenty-four-hour operation of its plant, the plaintiff employed extra labor, which, by reason of the defendant's failure to furnish goods, was held unemployed from December 29, 1917, to March 23, 1918, at an expense to the plaintiff in the sum of $3,013.52.

XI.

In order to treat the goods called for by the various purchase orders issued to the plaintiff by the defendant, the plaintiff purchased the necessary quantities of chemicals and materials to be used in such treatment, and when Government work was suspended before completion of the contemplated quantities, large quantities of chemicals and material were left on hand, and which were then worth less than had been paid for them. An inventory and appraisement participated in by representatives of the defendant showed that the plaintiff's loss on this account was $3,877.87.

XII.

During negotiations between the plaintiff and the defendant with reference to the work here involved, the defendant was fully informed as to the equipment and capacity of plaintiff's plant. Thereafter, in compliance with a demand of the defendant for increased production, the plaintiff purchased additional machinery and equip-

ment and completed a dry house, construction of which had already commenced. There was a value to the plaintiff in some of this machinery and equipment after cessation of Government work.

The additional expense to which the plaintiff was put in complying with the demands of the defendant in this respect, over and above the remaining value to it after cessation of Government work, was $20,000.00.

53 XIII.

From bills rendered by the plaintiff for goods treated by it certain unauthorized deductions were made in the aggregate sum of $954.09, which has not been paid.

XIV.

When requirements with reference to insurance and other matters were being discussed between representatives of the plaintiff and defendant it was agreed that the plaintiff might carry a blanket policy in its name on goods in its custody in the sum of $300,000. Afterwards it was required to carry separate policies on different lots in the name of the defendant to the full value of the goods at increased rates. Policies were not always promptly canceled when goods covered were removed and cancelations were at short rates. In connection with the requirement for these policies the plaintiff was not required to furnish any bond for the goods. By reason of being required to carry insurance in this form plaintiff was put to an additional expense of $2,960.68.

XV.

Reference is here made to facts set out in finding II as to the capitalization of the original company, plaintiff's predecessor, the reorganization, the future course of its business, and the destruction of the plant by fire in October, 1916. The extent to which it had recovered its business during 1917 and the amount thereof during that year is not definitely shown. But whatever it was, it was given up that the capacity of its plant might from January 1, 1918, be devoted to Government work of the kind here involved. When in the latter part of 1917 this arrangement was made the plaintiff's plant, its processes, business, and good will as a going concern were valuable, but what the value thereof was is not shown to the satisfaction of the court on the present record.

When Government work ceased in November, 1918, the plaintiff had no other business upon which it could continue the operation of its plant and it became idle. The cessation of hostilities left the Government with large quantities of goods on hand of the kind produced by the plaintiff company and by other concerns producing for the Government the same general character of goods. These goods were sold by the Government at different times in large lots at public auction and generally at prices below cost of production, and the sale of these goods by the Government supplied to a very considerable

extent the demands of the trade for this class of goods. In an effort to reestablish its business and preserve the value attaching to its plant as an operating concern and in the belief that if normal conditions should be restored it could again do a profitable business, it has expended considerable sums of money, by operating at a loss, in keeping its business alive and its organization existent, and by reason of such efforts since the cessation of Government work it has sustained an operating loss of $125,000. It has not succeeded in reestablishing its business on a profitable basis, and its plant and business are now worth much less than before it took on Government work and devoted its facilities thereto.

54 Conclusion of Law.

Upon the facts found the court concludes as matter of law that the plaintiff is entitled to recover of and from the United States the sums following, to wit, two thousand one hundred forty-seven dollars and five cents ($2,147.05) under finding VI; five hundred forty-four dollars and sixty cents ($544.60) under finding VII; eleven thousand two hundred forty-nine dollars and sixteen cents ($11,249.16) under finding VIII; two thousand nine hundred fifty-three dollars and eleven cents ($2,953.11) under finding IX; three thousand thirteen dollars and fifty-two cents ($3,013.52) under finding X; three thousand eight hundred seventy-seven dollars and eighty-seven cents ($3,877.87) under finding XI; twenty thousand dollars ($20,000.00) under finding XII; nine hundred fifty-four dollars and nine cents ($954.09) under finding XIII; two thousand nine hundred sixty dollars and sixty-eight cents ($2,960.68) under finding XIV; in all, the sum of forty-seven thousand seven hundred dollars and eight cents ($47,700.08), and that otherwise the plaintiff is not entitled to recover. Judgment is directed accordingly.

55 V. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the Thirty-first day of October, A. D., 1921, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises find in favor of the plaintiff, and do order, adjudge and decree that The Price Fire and Water Proofing Company, as aforesaid, is entitled to recover and shall have and recover of and from the United States the sum of Forty-seven thousand seven hundred dollars and eight cents ($47,700.08).

By THE COURT.

VI. *Proceedings After Entry of Judgment.*

On December 17, 1921, plaintiff filed a motion for a new trial. Said motion was overruled by the Court January 3, 1922.

VII. *Plaintiff's Application for an Allowance of an Appeal.*

Comes now the plaintiff above named and makes application for an appeal to the Supreme Court of the United States from the judgment rendered against the plaintiff therein on October 31, 1921, and from the judgment of the Court in overruling plaintiff's motion for a new trial on January 3, 1922.

S. S. ASHBAUGH,
Attorney for Plaintiff.

Filed January 12, 1922.

Ordered: That the above appeal be allowed as prayed for.
January 23, 1922.

By THE COURT.

56 Court of Claims.

No. 34707.

THE PRICE FIRE & WATER PROOFING COMPANY

vs.

THE UNITED STATES.

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact and conclusion of law entered by the Court; of the judgment of the Court; of the plaintiff's application for and allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this 23 day of January, A. D. 1922.

[Seal of Court of Claims.]

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

Endorsed on cover: File No. 28,667. Court of Claims. Term No. 712. The Price Fire & Water Proofing Company, appellant, vs. The United States. Filed January 23d, 1922. File No. 28,667.

FILED
DEC 23 1922
WM. R. STANSBU
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 257.

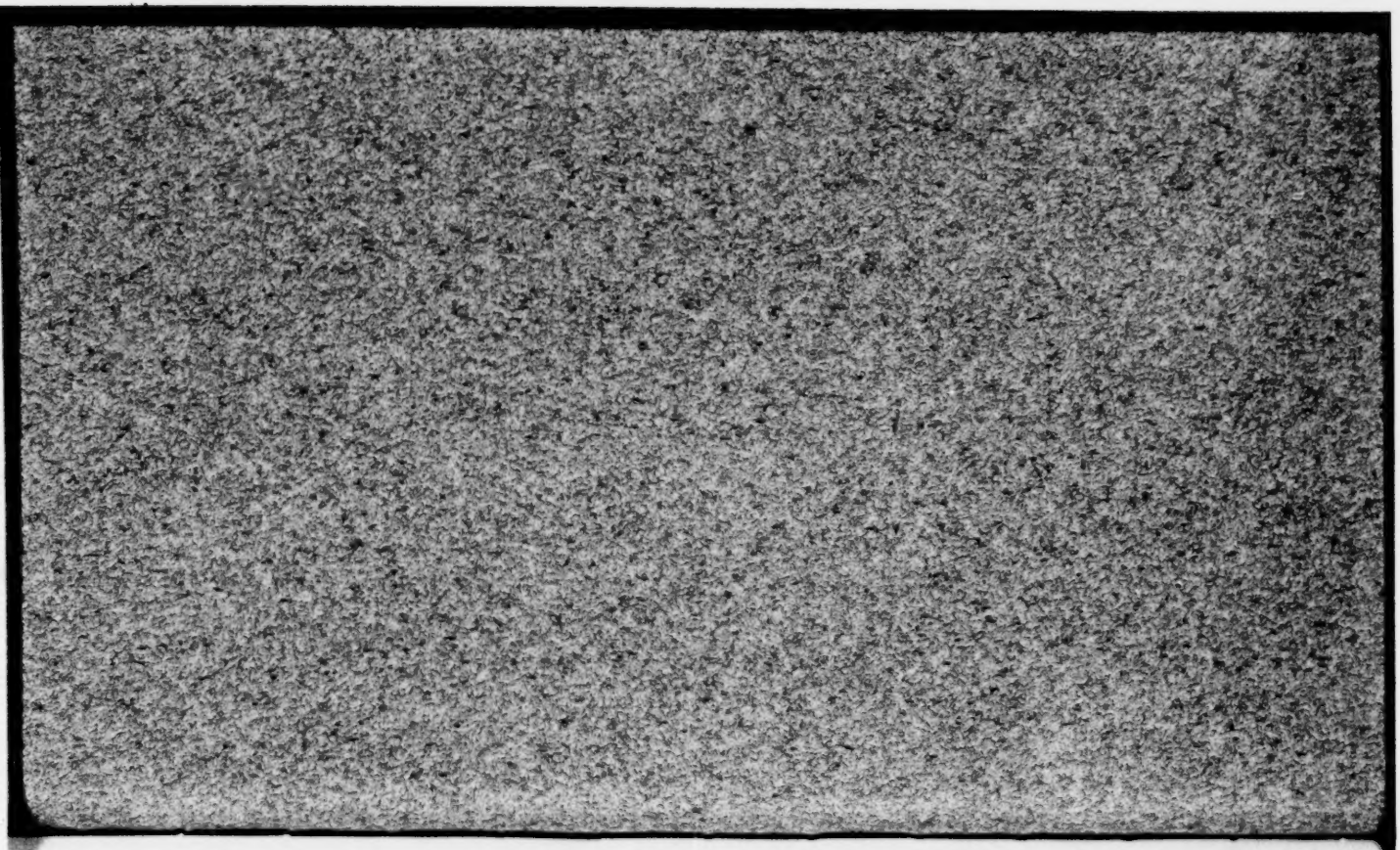
THE PRICE FIRE & WATER PROOFING COMPANY,
Appellant,

vs.

THE UNITED STATES.

BRIEF FOR APPELLANT.

S. S. ASHBAUGH,
Attorney for Appellant.



IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 257.

THE PRICE FIRE & WATER PROOFING COMPANY,
APPELLANT,

vs.

THE UNITED STATES.

BRIEF FOR APPELLANT.

I.

Statement of the Case.

The petition in this case was filed in the Court of Claims on September 29, 1920, demanding a judgment for expenses incurred by the plaintiff in the taking and appropriation of its plant, located at Poughkeepsie, New York, and in the destruction of its business as a part thereof, by the officers of the War Department for the purpose of supplying materials for the speedy prosecution of the war with Germany.

To this petition, after sixty days, the statutory traverse was interposed. Testimony was taken by both parties and the case was submitted to the court and judgment rendered on October 31, 1921, in favor of the plaintiff, on each of the first nine causes of action, in the sum of $47,700.08, but judgment was refused for the expenses incurred in an effort to keep "its business alive and its organization existent" down to the time when the testimony was taken in the case, no opinion being filed. No objection was entered by the defendants to the rendition of the judgment in favor of the plaintiff for this $47,700.08 and no appeal therefrom was taken. The plaintiff, however, objected to the refusal of the court to render a judgment upon the facts found in its favor for the expenses incurred in the effort to keep "its business alive and its organization existent" and filed a motion for a new trial demanding judgment for the expenses so found to have been incurred, which motion was by the court, on January 3, 1922, overruled. The plaintiff thereupon made application, on January 12, 1922, for an appeal from the judgment so rendered against it on October 31, 1921, which appeal was, on January 23, 1922, allowed by the court, and on that date the transcript of the record in the case was filed in this court.

II.

Assignments of Error.

First. The court erred in refusing to render judgment in favor of the plaintiff for the expenses incurred by it in its efforts to keep "its business alive and its organization existent" down to February 28, 1921, when the testimony was taken in the trial of the case.

Second. The court erred in rendering judgment, as set down in the conclusions of law, in holding that "otherwise the plaintiff is not entitled to recover," and thus refusing to render judgment for the expenses incurred upon the findings of fact made by the court.

Third. The court erred in overruling the plaintiff's motion for a new trial, where a judgment for these expenses so incurred was demanded in accordance with the facts already found by the court.

III.

Statement of Facts.

The Price Fire & Water Proofing Company has for a long time been and now is a corporation duly organized under the laws of the State of New York for the purpose of treating cloth by dyeing, waterproofing, and fireproofing, preparing and rendering such cloth suitable and in proper condition to be used for curtains in theaters and other similar places, for tents wagon covers, tarpaulins, gas-mask covers during time of war, and other similar purposes, using therein and therefor the different grades of duck or canvas furnished for said treatment and using therefor various original chemical processes most suitable for these purposes. A large and progressive plant had been erected at Poughkeepsie, New York, and an extensive business was secured.

When the war with Germany was declared the officers and agents of the War Department, knowing the superior quality of the plaintiff's output, demanded that the Price Fire & Water Proofing Company should cancel all of its private

business and turn the plant and all of its appliances over to the War Department for the purposes of supplying gas-mask covers, tent and wagon covers, tarpaulins, and other similar facilities for use in the vigorous and successful prosecution of the war with Germany. The officers of the plaintiff corporation objected to many of the conditions imposed, but, upon the demands and threats of the officers of the War Department forcibly to take possession of the plant and to prosecute the officers for resisting the demands thus made, the plant and all of its facilities were in effect commandeered by the officers of the War Department for the uses described and all the orders and demands of the officers of the War Department were complied with, and the whole plant and its facilities were operated under the supervision and in accordance with the directions of the officers and agents of the Government. As a part of the compliance with these orders and demands the entire private business of the plaintiff was given up on January 1, 1918.

All of these conditions, orders, memorandums, and expenses were set out in the petition filed in the court below and found beginning on page 1 of the record.

The first nine counts of the petition, beginning on page 7 and ending on page 18 of the record, include the particular expenses incurred, which expenses were fully described in the evidence and found by the court, beginning on page 32 of the record. Upon the facts so found by the court judgment was rendered in favor of the plaintiff on the first nine counts of the petition in the sum of $47,700.08, to which no objection was made by the defendants and from which no appeal has been taken.

The tenth cause of action, found at page 18 of the record,

alleged the taking of the plant and all its facilities and the cancellation of the private business of the plaintiff at the time the demand was made and the control passed to the Government. The plaintiff alleged in the tenth count of the petition that because of the taking and appropriation of its private property and because of the destruction of its private business as a part thereof it had incurred expenses in an effort to keep the physical property from disintegration and destruction, and in an effort to regain such private business, in an amount not less than $130,000.00, and upon the testimony introduced the court found, in Finding No. XV, on page 37 of the record, as follows:

> "Reference is here made to facts set out in Finding II as to the capitalization of the original company, plaintiff's predecessor, the reorganization, the future course of its business, and the destruction of the plant by fire in October, 1916. The extent to which it had recovered its business during 1917 and the amount thereof during that year is not definitely shown. But whatever it was, it was given up that the capacity of its plant might from January 1, 1918, be devoted to Government work of the kind here involved. When in the latter part of 1917 this arrangement was made the plaintiff's plant, its processes, business, and good will as a going concern were valuable, but what the value thereof was is not shown to the satisfaction of the court on the present record.
>
> "When Government work ceased in November, 1918, the plaintiff had no other business upon which it could continue the operation of its plant and it became idle. The cessation of hostilities left the Government with large quantities of goods on hand of the kind produced by the plaintiff company and by other concerns producing for the Government the

same general character of goods. These goods were sold by the Government at different times in large lots at public auction and generally at prices below cost of reproduction, and the sale of these goods by the Government supplied to a very considerable extent the demands of the trade for this class of goods. In an effort to re-establish its business and preserve the value attaching to its plant as an operating concern and in the belief that if normal conditions should be restored it could again do a profitable business, it has expended considerable sums of money, by operating at a loss, in keeping its business alive and its organization existent, and by reason of such efforts since the cessation of Government work it has sustained an operating loss of $125,000.00. It has not succeeded in re-establishing its business on a profitable basis, and its plant and business are now worth much less than before it took on Government work and devoted its facilities thereto."

These facts, so found by the court below, are undisputed, and the refusal of the court to render judgment in favor of the plaintiff for the $125,000.00 as expenses incurred as described is the error alleged above.

It will be noted that in the $125,000.00 so demanded there is no claim for compensation for property taken or business destroyed or for rental for property used or for loss of profit on business anticipated or canceled. It is here clearly found that the plaintiff's property was taken and used and its business destroyed, and that as a means of preserving its property and organization, and in an effort to regain its business, it actually expended the sum of $125,000.00.

Upon the facts so found by the court the judgment in favor

of the plaintiff, instead of $17,700.08, should have been $172,700.08, for which judgment is now prayed.

The foundation of this last finding just quoted is in the allegations in the tenth cause of action, found on page 19 of the record, where it is alleged:

> "That the appropriation of said plant and its facilities, together with the destruction of the plaintiff's business, as aforesaid, caused great and continuous losses to the plaintiff, not included in any of the causes of action hereinbefore set out, and not including any loss of prospective or possible profits on any part of the orders beyond the goods and supplies delivered to and accepted by the United States, but which are shown in the expenditures necessarily made, in the obligations and liabilities incurred and discharged in performing and preparing to perform said orders and extraordinary demands, in the destruction of the established business and the expenses incurred in the efforts to regain and re-establish the business when the markets had been supplied as aforesaid."

The finding of the court above set out, so closely following this allegation of the petition, clearly warrants the addition of $125,000.00 to the existing judgment, which additional amount alone is involved in this appeal.

IV.

Argument.

The Government is liable for the expenses incurred by the owner of private property resulting from the taking and appropriation of such property for public use, including the

destruction of its private business connected therewith, during the late war with Germany. The court below found the facts on this point in favor of the plaintiff, but refused to render judgment thereon. This was error.

This taking and appropriation of the plaintiff's entire plant and the discontinuance of its business as a part thereof was clearly found by the court below. In Finding No. III, on page 34 of the record, it is said:

> "It was agreed between plaintiff's representative and Mr. Wilson that the plant should be at the disposal of the Government from and after January 1, 1918," and "that without waiting for further instructions they were to prepare to proceed with the work."

It was further found by the court, in Finding No. V, on page 34:

> "The plaintiff had notified its customers that its entire plant was to be at the service of the Government after January 1, 1918; and had declined to take on any private business thereafter, and had canceled contracts and orders to be performed after that time."

It was further stated, in the same finding and on page 35, as follows:

> "Goods were not furnished for treatment by January 1st, in consequence of which the plant remained idle for a time. Some of the orders referred to were received about this time and they contained conditions which the plaintiff did not understand were a part of their agreement when prices were submitted, and plaintiff's representatives sought an interview with Mr. Wilson, in which they stated that these additional requirements would increase cost and would take away every element of profit, and that they did

> not want the orders under the conditions imposed. They were informed by Mr. Wilson that the Government had to have their production and was authorized by law to take over their plant, and if they refused it would probably result in a commandeering of their plant, and they would render themselves liable to criminal prosecution. Promise was made by Mr. Wilson that if they would go ahead and do the best they could prices would be so arranged in subsequent orders as to care for the unanticipated requirements."

This appropriation was further shown when the plaintiff was required to change its methods of insurance and to carry the policies in the name of the Government at a much higher rate, as is stated in Finding No. XIV, page 37, where it is said:

> "Afterwards it was required to carry separate policies on different lots in the name of the defendant to the full value of the goods at increased rates."

Relating particularly to the destruction of the business, the court further stated, in Finding No. XV, page 37, as follows:

> "The extent to which it had recovered its business during 1917 and the amount thereof during that year is not definitely shown. But whatever it was, it was given up that the capacity of its plant might from January 1, 1918, be devoted to Government work of the kind here involved. When in the latter part of 1917 this arrangement was made the plaintiff's plant, its processes, business, and good will as a going concern were valuable, but what the value thereof was is not shown to the satisfaction of the court on the present record."

These findings of the court below bring the present case squarely within the rule laid down in the case of *Roxford Knitting Co. v. Moore & Tierney,* 265 Fed., 177, which rule was approved by this court in 253 U. S., 498; 64 L., 1031. The demands of the Government in the Roxford case were of the same nature as in the case at bar; the orders and the method of enforcement were similar in form and effect; the obligation established in the one case must be the obligation in the other. In both cases the demands and orders of the Government were compulsory; the private parties had no option as to compliance; such performance, therefore, carries with it the obligation of the Government to reimburse the parties for the expenses incurred. In the opinion in the Roxford case, as found in 11 A. L. R., 1428, it is said:

> "And when a manufacturer is given to understand that he is required to supply certain goods to the Government of the United States, and is told that he has no option to decline to comply, we are satisfied that as to those goods an 'order' has been placed or received, within the spirit and intent and the letter of the statute, whether the authoritative direction is written or oral, and notwithstanding the fact that the parties actually come to an agreement in what has the form of a contract. Substance is not to be sacrificed in such cases to form."

This rule was approved in the cases cited in the notes on the case of *Brooks Tool Manufacturing Company, Limited, v. Hydraulic Gears Company, Limited,* 9 A. L. R., 1510, and in the notes on the case of *Allanwilde Transport Corporation v. Vacuum Oil Company,* 3 A. L. R., 23.

From these decisions it is clear that the court below, in

making the findings of fact as to the taking of the plaintiff's plant and its business, based those findings upon the rule of law above stated. The facts so found by the court below are definite and material. They are inseparable parts of one transaction. No objection was taken to these findings by the defendant in the court below, and they stand unimpeached and unimpeachable, both on the law and the evidence in this case.

The liability of the Government for the expenses incurred in taking the plaintiff's plant and its business down to the time when the testimony was taken was found and accepted by the court below in making Finding No. VIII of the record in passing upon the facts in the third cause of action, where the court below allowed the $47 per month as rent for the Wheeler House, of which the plaintiff was deprived soon after the plant and its business were demanded and taken over by the Government, and which loss of rental income was found to continue down to the date when the testimony was taken in the court below. This Finding No. VIII is in exact accordance with the facts in the case and with the rule of law as laid down in the Foxford case, above quoted. If the $47 per month was a continuing obligation of the Government after the armistice and the cancellation of the orders which was found by the court below, then the obligation for the expenses of preserving the plant and organization must also continue during a time found reasonable by the court. No exception was taken by the defendant in the court below to the judgment continuing the liability for the $47 per month down to the 28th day of February, 1921, and including it in the judgment on the third cause of action, and the balance of the obligation now in issue must continue

during the same period. The amount found due in connection with the Wheeler House, having been made a part of the judgment in favor of the plaintiff for $11,249.16, as set out on page 38 of the record, was in itself sufficient authority for including the $125,000.00 in the general judgment, which amount was also found by the court below to have been expended as alleged.

This finding was based upon the tenth cause of action, set out at page 18 of the record and quoted above, and shows upon its face that the claim of the plaintiff below in this cause of action was for the expenses incurred as a direct result of the compulsory demands of the defendants, and is not in any way or to any extent whatever founded upon any claim for compensation or profit upon any contract entered into between the parties. The plaintiff in this case was represented by loyal citizens of the Government, who were perfectly willing to do their part in the great war with Germany and have never sought to hold the Government liable for any amount of money which they might have made with their plant unobstructed and their business unimpeded. The plaintiff specifically founded this cause of action upon the direct expenses necessarily put up from month to month in order to keep "its business alive and its organization existent," as stated by the court. Its private business had been entirely destroyed. The amount so expended is an obligation of the Government clearly arising from its own demands.

There can be no question now raised as to the amount of these expenses. That question was fully presented to the court below and is specifically stated in Finding No. XV, quoted above. There can be no question as to the time when these expenses began and when they ended. There was no

question that these expenses were properly disbursed. These questions are not now raised and cannot be brought before this court. If the Government is liable for the necessary expenses incurred by private persons in taking their property and the business connected therewith for public use in the war with Germany, then this expense of $125,000.00 is a legal liability against the defendants. Congress necessarily made such expenses as these a part of such legal liability when the Government was authorized specifically to take private property and use it for the public prosecution of the war. These expenses are inherently a necessary part of the taking and use of the plaintiff's plant and its business. It is from a legal standpoint unthinkable that the Government could be authorized to take the plaintiff's plant and its business for a legitimate public use, and then to compel the plaintiff to pay the expenses incident to such an appropriation. This must necessarily be so or the appropriation would be unconstitutional. The statute which authorized this taking was constitutional, the purpose was legitimate, and the obligation of the Government follows.

The liability of the Government as claimed above is in accordance with the decisions of this court in the case of the *United States v. Russell,* 13 Wall., —; 80 U. S., 623; 20 L., 474, where it is said in the head notes:

> 1. Where the Government, in time of public danger, takes private property for public purposes, it is bound to make full compensation to the owner.
>
> 2. Where steamboats were impressed into public service from imperative military necessity, the Government is bound to make full compensation to the owner for the services rendered.

3. The employment and use of the steamboats raised an implied promise on the part of the United States to reimburse the owner for the services rendered and expenses incurred, and the Court of Claims has jurisdiction of such claims.

In the opinion Mr. Justice Clifford said:

"Such a taking of private property by the Government, when the emergency of the public service in time of war or impending public danger is too urgent to admit of delay, is everywhere regarded as justified, if the necessity for the use of the property is imperative and immediate and the danger, as heretofore described, is impending; and it is equally clear that the taking of such property under such circumstances creates an obligation on the part of the Government to reimburse the owner to the full value of the service. Private rights under such extreme and imperious circumstances, must give way for the time to the public good, but the Government must make full restitution for the sacrifice.

"Beyond doubt, such an obligation raises an implied promise on the part of the United States to reimburse the owner for the use of the steamboats and for his own services and expenses, and for the services of the crews during the period the steamboats were employed in transporting Government freight pursuant to those orders. *Indebitatus assumpsit* is founded upon what the law terms an implied promise on the part of the defendant to pay what, in good conscience, he is bound to pay to the plaintiff, but the law will not imply a promise to pay unless some duty creates such an obligation, and it never will sustain any such implication in a case where the act of payment would be contrary to duty or contrary to law." *Curtis v. Feidler,* 2 Black, 478 (67 U. S., XVII, 276).

This case was referred to and most extensively approved in the case of *Schillinger v. United States,* 155 U. S., 171; 39 L., 111. In the case the court quoted the finding of fact as set out in the *Russell* case as follows:

> "That in the case of each of these steamers, at the times when the same were respectively taken into the service of the United States, the officers acting for the United States, *did not intend to 'appropriate' these steamers to the United States, nor even their services; but they did intend to compel the captains and crews with such steamers to perform the services needed, and to pay a reasonable compensation for such services, and such was the understanding of the claimant;* and that each of said steamers, so soon as the services for which they were respectively required had been performed, were *returned* to the exclusive possession and control of the claimant."

The case of the *United States v. Russell* is cited with approval in the case of *Crozier v. Krupp,* 224 U. S., 305, where it is said:

> "This inquiry may be solved, under the conditions here involved, by taking the most exacting aspect of the well established and indeed elementary requirements in favor of property rights essential to be afforded in order to justify the taking by Government of private property for public use."

This same proposition is well established in the language found in Cooley on Constitutional Limitations, fifth edition, page 701, where it is said:

> "But, in estimating either the injuries or the benefits, those which the owner sustains or receives in common with the community generally, and which are

> not peculiar to him and connected with his ownership, use, and enjoyment of the particular parcel of land, should be altogether excluded, as it would be unjust to compensate him for the one, or to charge him with the other, when no account is taken of such incidental benefits and injuries with other citizens who receive or feel them equally with himself, but whose lands do not chance to be taken."

In the notes upon the foregoing paragraph it is said, in the case of *Henry v. Dubuque and Pacific R. R. Co.*, 2 Iowa, 300:

> "That the language of the constitution means that the person whose property is taken for public use shall have a fair equivalent in money for the injury done him by such taking; in other words, that he shall be made whole so far as money is a measure of compensation, we are equally clear. This just compensation should be precisely commensurate with the injury sustained by having the property taken; neither more nor less."

This same position is further supported in the notes by a quotation from the case of *Holton v. Milwaukee*, 31 Wis., 27, where it is said:

> "Compensation is an equivalent for property taken, or for an injury. It must be ascertained by estimating the actual damage the party has sustained. That damage is the sum of the actual value of the property taken, and of the injury done to the residue of the property by the use of that part which is taken."

The plaintiff did not "sustain or receive in common with the community generally" these expenses; nor did the depression of the market because of the sale of Government goods "at prices below cost of production" occur until many

months after these expenses began, and until large parts of them had been incurred. These expenses are peculiar to the plaintiff, and are connected directly with its ownership, use, and enjoyment of its own particular property and business, which in itself gives a basis for a further judgment for the $125,000.00. It is brought within the rule of the *Russell* case where the Government was held liable for the "services rendered and the expenses incurred." It is also within the rule stated in the *Henry* case where "just compensation should be precisely commensurate with the injury sustained by having the property taken; neither more or less."

The difference between the doctrine of Government liability for private property taken for public use, and the doctrine of *damnum absque injuria,* where loss is inflicted without liability, is clear and distinct. The one doctrine is within the rule of the *Russell* case for the taking of the steamboats where the act required the "United States to reimburse the owner for the services rendered and expenses incurred," and the other doctrine within the rule of the Soda Lake cases recently affirmed by this court, where a loss was inflicted but no taking of property was proved or found. The claim in issue is within the rule of the *Russell* case, where the taking is found, and not governed by the rule in the Soda Lake cases, where the alleged taking was not found to be true. The rights of the plaintiff have been fixed by these decisions of the several courts.

The conditions which confronted this plaintiff and made the expenditure of the $125,000.00 a necessity were apprehended and dealt with by this court in the recent case of *The Railroad Commission of Wisconsin v. The Chicago, Bur-*

lington & Quincy Railroad Company, 257 U. S., advance sheets, L. Ed., page 241, where it is said by Mr. Chief Justice Taft:

> "The owners insisted that their properties could not be turned back to them by the Government for useful operation without provision to aid them to meet a situation in which they were likely to face a demoralizing lack of credit and income. Congress acquiesced in this view. The Transportation Act of 1920 was the result. It was adopted after elaborate investigations by the Interstate Commerce Committees of the two Houses."

The conditions which confronted this plaintiff are fully described in the findings of fact by the court below and come strictly within the situation described by the Chief Justice. The principle there laid down should be applied in the case at bar. Congress was called upon to legislate in order to meet the conditions confronting the railroads. In the case of the plaintiff, however, the findings of fact show that the $125,000.00 were expended to meet a situation existing as to its plant and business growing out of the demands of the Government as authorized by the National Defense Act of June 3, 1916. The situation which confronted the plaintiff included "a demoralizing lack of credit and income," which was apprehended by the court below and made conclusive in the findings of fact, which situation still remains unprovided for and which can only be met by a corrected judgment in this case.

Respectfully submitted,

S. S. ASHBAUGH,
Attorney for Appellant.

In the Supreme Court of the United States.

OCTOBER TERM, 1922.

THE PRICE FIRE & WATER PROOFING Company, appellant, *v.* THE UNITED STATES. } No. 257.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

The appeal in this case brings up for review a judgment of the Court of Claims in so far as that court dismissed one of the causes of action set forth in the petition. The petition set forth ten causes of action. Upon the first nine the Court of Claims rendered judgment in favor of the plaintiff, but decided that the tenth cause of action was without merit.

The plaintiff is a New York corporation engaged in the business of waterproofing and fireproofing cloth. During the war it did a large amount of work of this kind for the War Department, and from about January 1st, 1918, until the armistice its plant was practically given up to Government work. Soon after

28100—23

the declaration of war the plaintiff's general sales manager sought the business and submitted samples. The committee in charge under the Council of National Defense, known as the Cotton Goods Committee, was seeking sources of supply. The plaintiff was invited to send a representative for a conference and sent its president, William B. Price. Mr. Price made up and submitted a schedule of prices for the treatment of various weights and widths of material by the treatment known as Emla A. After acceptance of the proposition it was concluded that the process known as the Repelite process would be more satisfactory, and Mr. Price submitted prices by that process which were accepted. Conferences were had with respect to the capacity of the plant, and it was agreed between the plaintiff's representatives and the committee that the plant should be at the disposal of the Government from and after January 1, 1918. (Third finding of fact, p. 33.)

From time to time various instruments or orders were issued to the plaintiff in the form of authorizations and orders and notices of the awarding of contracts, and also from time to time there were various modifications and partial cancellations of these orders and so-called supplemental agreements, and order directions and modifications were given by telephone and telegraph. These various orders or authorizations were not executed in the manner provided by law and were in an irregular and unauthorized form. After the cessation of hostilities the defendant canceled all orders then unfilled, and for the work

actually done the plaintiff was paid in accordance with the prices agreed upon. (Fourth finding of fact, p. 34.)

Thereafter, the plaintiff presented to the Secretary of War under Section 1 of the Act of March 2, 1919, known as the Dent Law, 40 Stat. 1272, a claim for losses incurred, and, while the Secretary of War offered to pay and adjust certain amounts and parts of the claim, the plaintiff was not willing to accept the adjustment, and suit was then brought in the Court of Claims.

The first nine causes of action were described in the petition under the following heads:

(1) Storage and hauling charges on untreated gray goods: On this cause of action the Court of Claims awarded the plaintiff the sum of	$2,147.05
(2) Storage charges on treated goods after notice of completion: On this cause of action the Court of Claims awarded the plaintiff the sum of	544.60
(3) Alterations and additions to the plant for storage purposes, including restoration: On this cause of action the Court of Claims awarded the plaintiff the sum of	11,249.16
(4) Extra protection demanded by the defendants: On this cause of action the Court of Claims awarded the plaintiff the sum of	2,953.11
(5) Wages paid unemployed labor from December 29, 1917, to March 23, 1918: On this cause of action the Court of Claims awarded the plaintiff the sum of	3,013.52
(6) Allowance on chemicals and materials left over after suspension of work: On this cause of action the Court of Claims awarded the plaintiff the sum of	3,877.87
(7) Increased plant facilities: On this cause of action the Court of Claims awarded the plaintiffs the sum of	20,000.00
(8) Deductions made by defendants because of increased yardage resulting from treatment and for alleged loss in shipment: On this cause of action the Court of Claims awarded the plaintiff the sum of	954.09
(9) Insurance premiums paid by plaintiff in excess of that provided for: On this cause of action the Court of Claims awarded the plaintiff the sum of	2,960.68
Total amount awarded by Court of Claims	47,700.08

The tenth cause of action, the one involved in this appeal, was entitled in the petition "Loss to commercial business." The appellant, on page 2 of its brief, describes this cause of action as "expenses incurred by it in its efforts to keep its business alive and organization existent." In its petition plaintiff demanded under this cause of action $590,000, but this claim has now been reduced to $125,000.

The Court of Claims found that plaintiff's predecessor company was incorporated in 1904, but that its processes, assumed in the beginning to be complete, had to undergo experimentation and further development, and this continued until 1912. By that time the company's fireproofing process was recognized as a superior one, much of the business in that line was acquired, and its waterproofing process was becoming well recognized, but its plant was not sufficiently equipped to make a commercial success, and a new plant had to be provided or else the enterprise abandoned. There was in 1912 a reorganization and the plaintiff company incorporated with a capitalization of $375,000, the assets and liabilities of the old company being taken over at $300,000, the balance of the capitalization furnishing an increase of $75,000 in available capital. A new plant was built and a new machine installed, but this machine did not fulfill the guaranty under which it had been bought. So much goods was spoiled and there was so much delay that the company lost its contracts and substantially lost its business. Prolonged litigation followed, during which the company was not able to

reequip or reestablish its business. The litigation was finally terminated in favor of the plaintiff, its machinery was remodeled, and it gradually recovered its business, so that by 1916 it was doing a substantial and growing business and until October of that year operated profitably. Then the plant was destroyed by fire. Speedy adjustment of insurance enabled a rapid restoration of the plant, so that one machine was put in operation by January, 1917, and the plant was gradually completed during that year, so that by the first of November one complete equipment was in place in addition to the machine known as the "grease machine."

> About or before this time and under these conditions the matter of taking up work for the United States came up for consideration and action. To what extent the plaintiff had then regain (sic) a commercial business is not shown. (Second finding of fact, pp. 32 and 33.)

The specific finding of the Court of Claims upon this cause of action is the 15th, page 37. After adopting by reference the facts in the second finding, which have hereinbefore been set forth, that court found as follows:

> The extent to which it had recovered its business during 1917 and the amount thereof during that year is not definitely shown. But whatever it was, it was given up that the capacity of its plant might from January 1, 1918, be devoted to Government work of the kind here involved. When in the latter part

of 1917 this arrangement was made the plaintiff's plant, its processes, business, and good will as a going concern were valuable, but what the value thereof was is not shown to the satisfaction of the court on the present record.

When the Government work ceased in November, 1918, the plaintiff had no other business upon which it could continue the operation of its plant and it became idle. The cessation of hostilities left the Government with large quantities of goods on hand of the kind produced by the plaintiff company and by other concerns producing for the Government the same general character of goods. These goods were sold by the Government at different times in large lots at public auction and generally at prices below cost of production, and the sale of these goods by the Government supplied to a very considerable extent the demands of the trade for this class of goods. In an effort to reestablish its business and preserve the value attaching to its plant as an operating concern and in the belief that if normal conditions should be restored it could again do a profitable business, it has expended considerable sums of money, by operating at a loss, in keeping its business alive and its organization existent, and by reason of such efforts since the cessation of Government work it has sustained an operating loss of $125,000. It has not succeeded in reestablishing its business on a profitable basis, and its plant and business are now worth much less than before it took on Government work and devoted its facilities thereto.

ARGUMENT.

Appellant asks this court to hold that it is entitled to recover from the United States the sum of $125,000 because of the finding of the Court of Claims that "it has expended considerable sums of money, by *operating at a loss,* in keeping its business alive and its organization existent, and by reason of such efforts *since the cessation* of Government work it has sustained *an operating loss* of $125,000."

Is the Government, then, to be held to have guaranteed to all those whose mills and other plants were utilized during the war a profitable business after the war ended, and if so, for how long a period? What authority is there for holding that the Government assumed any such obligation? Not in any act of Congress. Section 1 of the Dent Act, 40 Stat. 1272, authorized the Secretary of War to "adjust, pay, or discharge any agreement, express or implied, upon a fair and equitable basis," that was entered into in good faith prior to November 12, 1918, by any officer acting under his authority or that of the President, but it provided:

> That in no case shall any award, either by the Secretary of War or the Court of Claims, include prospective or possible profits on any part of the contract beyond the goods and supplies delivered to and accepted by the United States and a reasonable remuneration for expenditures and obligations or liabilities necessarily incurred in performing or preparing to perform said contract or order. * * *

And section 2 of the Act confers jurisdiction on the Court of Claims to find and award fair and just compensation in cases specified in Section 1 if the adjustment of the Secretary of War should be unsatisfactory.

Nothing is to be paid for under this contract except—

(1) Goods and supplies delivered to and accepted by the United States; and

(2) Reasonable remuneration for expenditures and obligations or liabilities necessarily incurred in performing or preparing to perform said contract or order.

Everything which the appellant did for the United States has been paid for according to the contract, and the Court of Claims has awarded it a judgment for the expenditures incurred in performing or attempting to perform the contract. There is no dispute about this.

This sum of $125,000, which the appellant now seeks, is an "operating loss" since Government work ended, sustained because—

(1) The appellant had no other immediate business to keep its plant occupied; and

(2) The market was flooded with goods sold by the Government at auction, some of which, it is to be noted, had been procured from the appellant and paid for at prices satisfactory to it.

But these facts do not show any breach of contract by the United States, nor any fact which can be called wrongful in any sense of the word, or upon which any legal liability can be based. Many men

who gave their time and services to the Government during the war found their business and professional employment temporarily lost when it was over, and lack of demand, falling prices, and consequent economic distress was the common experience of almost all business after the war. It may be that appellant was particularly unfortunate. It had been through a series of misfortunes extending over a period of thirteen years and culminating in a fire which destroyed its plant. When it undertook the Government work, the extent to which it had regained "a commercial business is not shown" (p. 33). It is quite likely that this made it unusually difficult for it to attain a position of profitable operation after the war, but whatever may have been the difficulty, the United States was not to blame.

We know of no authority which even intimates that a recovery can be had under such circumstances. None is cited on appellant's brief. That the Government must pay a just compensation for private property taken for public use is beyond question. What it took from the appellant was the entire output of its plant for ten or eleven months. The appellant sought the business and did it for an agreed price, and in addition the Court of Claims has given it over $47,000 for various expenditures deemed properly chargeable against the United States. The United States has, therefore, paid for everything it took from the appellant. The claim is not even based upon a loss from uncompleted business which it sacrificed when it undertook the

Government work, as was one of the claims in *Duesenberg Motor Corporation* v. *United States*, decided by this court November 13, 1922. That claim was a stronger one than this, but the court refused to recognize it. We know of no principle of law or of equity by which the United States, after it has fully discharged its contractual obligation, can be held liable because a contractor's business was unprofitable after the armistice.

The cases cited in appellant's brief tend in no way to support its claim. The case of *Roxford Knitting Company* v. *Pierney*, 265 Fed. 177, merely held that a manufacturer whose entire product was taken by the Government under the National Defense Act, and who was thus unable to perform its then existing contracts with third parties, was not liable in damages to those parties for breach of contract.

The case of *United States* v. *Russell*, 13 Wall. 623, cited on appellant's brief at page 13, really states the rule applicable to this case. Three steamboats employed by their owner in carrying private freight were impressed into the service as transports by the military authority under circumstances of "imperative military necessity." Mr. Justice Clifford, delivering the opinion of the court, said:

> Beyond doubt, such an obligation raises an implied promise on the part of the United States to reimburse the owner for the *use* of the steamboats and for his own *services* and *expenses*, and for the *services of the crews*

> *during the period the steamboats were employed in transporting Government freight* pursuant to those orders. (Italics ours.)

What the Government was bound to do, therefore, was to reimburse the owner for what he had done during the period his boats were employed by the Government. It is not intimated that there was any obligation upon the Government to guarantee profitable operation after the boats were returned to their owner.

So, what the Government was obligated to pay for here was for services performed by the appellant and expenses incurred while its plant was employed in Government work. When the services of the steamers as transports in the *Russell case* ended, the boats were returned to the exclusive possession and control of the owner. In appellant's brief the word "appropriation" is frequently used to characterize the use made of appellant's plant by the War Department, as if that word imported some extraordinary rule of damage; but the *Russell case* held that when the Government compelled the captains and crews of the steamers to perform the services needed, and, as soon as the services for which they were required had been performed, returned them to the exclusive possession and control of the owners, those facts did not constitute an "appropriation." This was the real point of the case, for the Act of July 4, 1864, provided that the jurisdiction of the Court of Claims should not extend to any claim against the United States growing out of the destruction or "appro-

priation" of, or damage to, property by the army or navy engaged in the suppression of the rebellion, and the claim of Russell was sustained because the court held that there had been no "appropriation" of his property, and therefore the Court of Claims had jurisdiction to entertain his suit.

Appellant also refers to the case of *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy Railroad Company*, 257 U. S. 563, for the purpose of showing that, in the case of the railroads, Congress made provision for helping them face the demoralizing lack of credit and income following Government operation by passing the Transportation Act of 1920.

Congress perhaps might have undertaken to guarantee the future earnings of all corporations which had performed Government contracts during the war, and have established a fund to assist them in financing their business during the period of depression. It did not do so, however.

The judgment of the Court of Claims, therefore, should be affirmed.

JAMES M. BECK,
Solicitor General.
ALFRED A. WHEAT,
Special Assistant to the Attorney General.

JANUARY, 1923.

○

PRICE FIRE & WATER PROOFING COMPANY v. UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 257. Argued January 22, 1923.—Decided February 19, 1923.

Expenses incurred by a manufacturer after termination of its work for the Government during the war and after November 12, 1918, in efforts to keep alive its organization and regain its commercial business, are not recoverable from the United States under the Dent Act, March 2, 1919, c. 94, 40 Stat. 1272. P. 183.

56 Ct. Clms. 502, affirmed.

APPEAL from a judgment of the Court of Claims in an action to recover, under the Dent Act, the amount of various expenditures and liabilities incurred by the claimant in connection with or growing out of work done for the Government.

Mr. S. S. Ashbaugh for appellant.

The plaintiff did not "sustain or receive in common with the community generally" these expenses; nor did the depression of the market because of the sale of government goods "at prices below cost of production" occur until many months after these expenses began, and until large parts of them had been incurred. They are peculiar to the plaintiff, and are connected directly with its ownership, use, and enjoyment of its own particular property and business, which in itself gives a basis for a further judgment for the $125,000.00. It is brought within the rule of *United States* v. *Russell*, 13 Wall. 623, where the Government was held liable for the "services rendered and the expenses incurred." It is also within the rule stated in *Henry* v. *Dubuque & Pacific R. R. Co.*, 2 Iowa, 300, that "just compensation should be precisely commensurate with the injury sustained by having the prop-

erty taken; neither more nor less." *Holton* v. *Milwaukee*, 31 Wis. 27.

The difference between the doctrine of government liability for private property taken for public use, and the doctrine of *damnun absque injuria*, is clear and distinct. The one doctrine is within the rule of the *Russell Case* and the other within the rule of the Soda Lake cases recently affirmed by this Court (*Horstmann Co.* v. *United States*, 257 U. S. 138) where a loss was inflicted but no taking of property was proved or found. The rights of the plaintiff have been fixed by these decisions of the several courts. See *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563.

Mr. Alfred A. Wheat, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* was on the brief, for the United States.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

By the Dent Act (March 2, 1919, c. 94, 40 Stat. 1272) the Secretary of War was authorized to adjust and discharge, upon a fair and equitable basis, agreements, express or implied, made prior to November 12, 1918, in connection with the prosecution of the war, "when such agreement has been performed in whole or in part, or expenditures have been made or obligations incurred upon the faith of the same by any such person, firm, or corporation prior to November twelfth, nineteen hundred and eighteen, and such agreement has not been executed in the manner prescribed by law." If an adjustment offered by the Secretary was refused by the claimant, the Court of Claims was given jurisdiction to award fair and just compensation. But it was expressly provided that neither the Secretary, nor the court, should include in the award "prospective or possible profits on any part of the con-

tract beyond the goods and supplies delivered to and accepted by the United States and a reasonable remuneration for expenditures and obligations or liabilities necessarily incurred in performing or preparing to perform" the contract.

The claimant herein owned an establishment for fireproofing and waterproofing cloth. In 1917, an arrangement was made by which, after January 1, 1918, the plant, with increased facilities, was to be operated, by the claimant, wholly on cloth to be delivered to it, from time to time, by the Government. Payment was to be made at an agreed rate per yard. No agreement was executed in the manner provided by law. Thereafter many orders for finishing goods were given. There were serious delays and irregularities on the part of the Government both in delivering the goods for finishing and in removing them from the premises after the work had been done; and upon the signing of the Armistice, all unfinished orders were cancelled. For all goods finished the claimant was paid, at the agreed price. But by the action of the Government prior to November 12, 1918, and by its cancellation of the orders, it was subjected to large and unanticipated expenses. A claim for these expenses and the losses incurred was duly presented to the Secretary of War. An adjustment offered by him was rejected; and thereupon claimant brought this suit in the Court of Claims for $641,313.64. The petition set forth ten distinct causes of action. On nine of these the court made the allowances set forth in the margin,[1] which aggregate $47,700.08; and judgment was entered below for this

[1] (1) Storage and hauling charges on untreated gray goods: On this cause of action the Court of Claims awarded the plaintiff the sum of..... $2,147.05

(2) Storage charges on treated goods after notice of completion: On this cause of action the Court of Claims awarded the plaintiff the sum of..... 544.60

amount. The tenth cause of action, on which $590,000 was claimed, was for loss to commercial business. On this no allowance was made. A motion for a new trial asked for by claimant (on what ground does not appear) was overruled. Whether the court erred in disallowing the claim on the tenth cause of action is the sole question for decision on this appeal.

The facts found by the court bearing especially on this cause of action were these:

"When in the latter part of 1917 this arrangement was made the plaintiff's plant, its processes, business, and good will as a going concern were valuable, but what the value thereof was is not shown to the satisfaction of the court on the present record.

(3) Alterations and additions to the plant for storage purposes, including restoration: On this cause of action the Court of Claims awarded the plaintiff the sum of	$11,249.16
(4) Extra protection demanded by the defendants: On this cause of action the Court of Claims awarded the plaintiff the sum of	2,953.11
(5) Wages paid unemployed labor from December 29, 1917, to March 23, 1918: On this cause of action the Court of Claims awarded the plaintiff the sum of	3,013.52
(6) Allowance on chemicals and materials left over after suspension of work: On this cause of action the Court of Claims awarded the plaintiff the sum of.	3,877.87
(7) Increased plant facilities: On this cause of action the Court of Claims awarded the plaintiff the sum of.	20,000.00
(8) Deductions made by defendants because of increased yardage resulting from treatment and for alleged loss in shipment: On this cause of action the Court of Claims awarded the plaintiff the sum of	954.09
(9) Insurance premiums paid by plaintiff in excess of that provided for: On this cause of action the Court of Claims awarded the plaintiff the sum of.	2,960.68
Total amount awarded by Court of Claims...	$47,700.08

"When Government work ceased in November, 1918, the plaintiff had no other business upon which it could continue the operation of its plant and it became idle. The cessation of hostilities left the Government with large quantities of goods on hand of the kind produced by the plaintiff company and by other concerns producing for the Government the same general character of goods. These goods were sold by the Government at different times in large lots at public auction and generally at prices below cost of production, and the sale of these goods by the Government supplied to a very considerable extent the demands of the trade for this class of goods. In an effort to reestablish its business and preserve the value attaching to its plant as an operating concern and in the belief that if normal conditions should be restored it could again do a profitable business, it has expended considerable sums of money, by operating at a loss, in keeping its business alive and its organization existent, and by reason of such efforts since the cessation of Government work it has sustained an operating loss of $125,000. It has not succeeded in reestablishing its business on a profitable basis, and its plant and business are now worth much less than before it took on Government work and devoted its facilities thereto."

Claimant contends here that it should be allowed to recover this $125,000 as expenses incurred in efforts to keep alive its business and organization to February, 1921, when the testimony was taken. The Dent Act does not permit any recovery on this ground. These were not "expenditures and obligations or liabilities necessarily incurred in performing or preparing to perform" the contract. Nor were they made or incurred prior to November 12, 1918. There was no breach of contract or wrongful act on the part of the United States in this connection. Nor was there a taking of property for which compensation can be made. It is urged here that the full

amount should be allowed to reimburse claimant for expenditures incurred at the plant in the early months of 1918, when it was idle because of the Government's delay in supplying goods for finishing. Some allowance for expenses incurred during that period was allowed under the fifth cause of action and is included in the $47,700.08 for which judgment was entered. For awarding more there is no basis in the findings. No request for additional findings appears to have been made below. Nor was leave sought there, or here, to reopen the case so that additional evidence could be introduced. The findings made are conclusive.[1]

Affirmed.